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No.

A TREATISE
ON THE
LAW OF CONTRACTS

BY
C. G. ADDISON
AUTHOR OF "THE LAW OF TORTS"

THIRD AMERICAN, FROM THE SEVENTH LONDON EDITION
OF LEWIS W. CAVE, ESQ.

BY
JAMES APPLETON MORGAN
OF THE NEW YORK BAR. AUTHOR OF "THE LAW OF LITERATURE;" AMERICAN EDITOR
OF "NECULVAR ON GUARANTY," &C. &C.

VOL. I

JERSEY CITY, N. J.
FREDERICK D. LINN & CO.,
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1881.

**Entered, according to act of Congress, in the year 1875,
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AMERICAN EDITOR'S PREFACE.

THE merits of Mr. Addison's elaborate treatise upon the Common Law of Contract, are too widely recognized to require recapitulation, and no apology can be necessary, at this time, in offering an American Edition of his pages to the profession in the United States.

While the reference to American cases accompanying the text of the present edition, will, it is hoped, enhance its practical value to the American student and practitioner, allusion need not be made to the absolute impossibility of bringing together, in one work, every reported case upon so vast a subject as the Law of Contract. It is believed, however, that an attempt to approach very nearly to such a desideratum will not fail to be appreciated, and attention is called to the fact, that between seven and eight thousand English cases, from the Year Books down, are treated or cited in Mr. Addison's text alone, while the notes to the first volume of the present edition alone adds reference to more than two thousand American decisions. If, therefore, upon the completion of the work (in three volumes) the American cases, as it is confidently expected, are fairly proportionate to the English, it would render the work, in comprehensiveness at least, the most exhaustive text-book upon the subject in the two great common-law nations of the world.

The text chosen is that of the seventh London Edition, prepared by Mr. Lewis W. Cave, barrister-at-law. With the exception of that gentleman's addenda and corrigenda, (which has been incorporated), his text has been suffered to remain intact, even in portions where consideration has been given to peculiar statutory contracts in England, for which our own jurisprudence, at present, furnishes but slight analogies. It is believed that the judgment of the profession will approve of this course, as preserving Mr. Addison's plan and treatment throughout, and as tending to the completeness and value of the Edition.

JAMES APPLETON MORGAN.

June 21, 1875.

229 Broadway, New York.

PREFACE

TO THE SEVENTH LONDON EDITION.

IN preparing this edition for the press, I have ventured to make very considerable alterations in the arrangement of the work, which I trust will be found to be improvements. In the former editions, after a chapter on the different kinds of contracts, and another on the mode of authenticating them, the consideration of particular contracts was at once entered upon ; and it was not until after the contracts of sale, mortgage, demise, service, bailment, carriage, insurance, suretyship, agency, partnership and marriage, with all their complications, had been discussed, that the consideration of those wide principles which are applicable to contracts generally was resumed. I have thought it best to depart from this somewhat unscientific arrangement, and to adopt one which seems more logical. I have divided the works into three books—the first treats of the law of contracts generally ; the second deals with particular contracts, and points out how in these the general law is developed or modified ; and to the third is consigned the subject of stamps, a portion of the book which, although without much interest for a student of jurisprudence, has its necessary value in the eyes of the practicing lawyer. It was not until after this

arrangement had been decided upon that I saw the Indian Contract Act of 1872, and found that a similar arrangement had been adopted in that Act by my friend Mr. Fitzjames Stephen, Q. C., on whose authority alone I would be content to rely.

The cardinal alteration thus resolved on necessarily drew with it several minor changes; and these were made somewhat more numerous by the passing of the Supreme Court of Judicature Act, which, although it deals with the law of procedure rather than with the substantive law of contracts, has yet enabled the latter to be stated in a clearer and more concise manner.

The scheme of the present edition may be stated shortly as follows:—The first book being, as already explained, devoted to the law of contract in general, is divided into six chapters. Of these, the first deals with the principles governing the formation of contracts, which are comprised in three sections relating respectively to the several kinds of contracts known to the law, the parties to contracts, and the mode of authenticating contracts. Having ascertained by whom contracts can be made, and how they must be authenticated, the work proceeds in the second chapter to deal with the interpretation of contracts in two sections, one of which expounds the general principles of interpretation, while the other deals with a question which has given rise to much litigation, namely, how far oral evidence is admissible for the purpose of adding to or explaining a contract which the parties have chosen to put into writing, and which is alleged by one party or the other not to express the whole agreement between them. It is not, however,

every contract, although made by competent parties, duly authenticated, and clearly expressed, which the law will enforce; and the third chapter, therefore, treats of contracts which the law will not enforce, either on the ground that they are absolutely void, or that, although not absolutely void, they have been made under circumstances entitling one of the parties to avoid them. Assuming that parties competent to contract have duly bound themselves by a clear contract of such a nature as the law will enforce, the next question is how this contract or obligation is discharged, a subject considered in the fourth chapter, which, in the first section, deals with the performance of contracts; in the second, with their discharge by the consent of the parties; and in the third, with their discharge by operation of law. Hitherto we have dealt with contracts on the assumption that the original parties to the contract remain parties thereto until it has been discharged; but not unfrequently, by assignment, or by the death, marriage, or bankruptcy of one of the parties, another person is substituted in his place while the contract is yet unsatisfied. The complications thus introduced form the subject of the fifth chapter. The sixth, which completes the first book, deals with the remedies for actual or contemplated breaches of contract by an action for damages, or by enforcing specific performance.

The second book, which treats of the law of particular contracts, is divided into eight chapters. The first of these is devoted to the contract of sale, or complete alienation of property and is broken up into three sections confined respectively to the sale of immovable, of movable and of incor-

poreal property. The second chapter discusses the contract of letting or partial alienation of property. The third treats of contracts for services, which, by some writers, have been likened to contracts of sale, and by others to contracts of letting, but which really appear to have but a superficial resemblance to either. Of this chapter, the first section deals with the general principles regulating contracts for services, while the second and third treat respectively of the relation of master and servant, and of consignor and carrier. The fourth chapter contains a summary of the law relating to the different modes, such as mortgage, pledge, or lien, by which property may be charged with, and made a security for, the payment of money. For the want of a better term to include these different varieties, I have ventured to call them contracts of security. This chapter, dealing as it does with a similar subject-matter, is divided similarly to the first chapter. In the fifth chapter I have included the contracts of suretyship and of marine, fire, and life insurance, which I have termed contracts of indemnity, the contract of life insurance, although, perhaps, not strictly speaking a contract of indemnity, presenting so many analogies to the other contracts of insurance, especially to the insurance of a ship by a valued policy, as to warrant, I venture to think, its being included in this chapter. In the sixth chapter I have treated of mercantile instruments, such as bills, notes, and cheques; and in a separate section, bills of lading. The seventh chapter groups together as contracts of association, the law regulating the relations *inter se* of partners, members of joint-stock companies, and husband and wife. The eighth and last

chapter of this book in treating of implied contracts approaches the law of torts, and treads upon the border land separating it from the law of contracts.

Here I would have gladly stopped ; but the necessities of the practicing lawyer and the precedent of previous editions seemed to call for a summary of the law of stamps ; and this I have accordingly added in a separate book, which the student, who will find in it little to reward him, can avoid.

Although I have endeavored, in the manner above stated, to throw the work, so far as its principal divisions are concerned, into a somewhat more systematic and logical form, I cannot flatter myself that I have carried out my design into all the details of the work. Such a task would have required far more leisure than I have been able to find in the short interval which has elapsed since the last edition, which is now exhausted, was published. Some little I have done, and more I hope to do, if I am permitted to revise another edition ; but I must trust to the indulgence of the profession to excuse many defects of which I am painfully conscious.

The reader will notice that the type has been enlarged, and that the Index is no longer printed in double columns, an alteration which will be found considerably to increase the facility of using it, as it admits of easier distinction of the subjects falling under each head by variations of the marginal spaces. The head-notes of the different chapters, which, being printed in double columns and without reference to the pages, were quite useless, have been omitted ; and the table of contents, no longer in double columns, is

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so printed as to show the relation of the various subjects to each other in a way which was impossible so long as the former system of printing it was maintained.

The first sheets of this edition went to the press in January, 1874; the Acts passed in the session of 1874, after the portion of the work to which they relate had been printed, have been referred to in the Addenda.

An Index of Statutes has been added to this edition, and it is hoped will be found useful.

In this, as in the preceding edition, I have been ably assisted throughout by my friend, Mr. Horace Smith of the Midland Circuit, to whom my best thanks are due.

LEWIS W. CAVE.

4, PAPER BUILDINGS, TEMPLE,

December, 1874.

PREFACE

TO THE FIRST EDITION

IT is unnecessary to dilate at length upon the vast importance of the Law of Contracts, upon its intrinsic excellence and merits, and the advantage of an acquaintance with its general rules and principles to every man of business, as well as to the professed lawyer. There is scarcely an individual of any property or station in the country who does not every week, nor any mercantile man who does not every day of the week, nay every hour of the day, contract the obligations, or acquire the rights of a buyer or seller, of a hirer or letter to hire, of a debtor or creditor, of a borrower or lender, of a depositor or depositary, of a commissioner or employer, of an insurer or insured, of a receiver, or agent, or trustee; and it is unwise, as well as dangerous, for a man to contract obligations, and acquire rights, of which he has in many instances no just or accurate perception, and to involve himself in liabilities and responsibilities, without knowing the nature and extent of them.

In Germany and Holland the study of the law has long constituted an essential branch of a liberal education; and it is surprising that, in a commercial country like our own, so little attention should be paid by the public at large to the

science of jurisprudence, or, at all events, to those general rules and principles of our ancient and excellent common law which regulate and control the ordinary intercourse of mankind, and define and ascertain the rights and liabilities of parties under the varying events and circumstances of daily life. There was a period in the history of this country, when a knowledge of the law was considered an essential part of education: and Sir John Fortescue tells us, that in his time there were in the inns of court two thousand students, the sons of knights and barons, who were placed there, not to be thoroughly learned in the law, or to get their living by its practice, but to be fitted for the exercise of their duties in public and private life.

It is a popular notion, that the law of England is a mere collection of positive rules, the knowledge of which is desirable so far only as it may be conducive to immediate interest, or may furnish the means of professional employment and remuneration; but however correct this notion may be as regards certain branches of the law, it certainly is not true with reference to the Law of Contracts, which is not founded upon any positive or arbitrary regulations, but upon the broad and general principles of universal law.

Frequent reference will be found in the ensuing pages to the Pandects and Institutes of Justinian and the great body of the Roman law, which is so richly stored with general principles illustrative of the Law of Contracts, and where there is so "surprising an uniformity" with the decisions of our own courts of justice as to have induced many writers to suppose that the leading rules of the common law have been borrowed from the civil law. In several instances this

has undoubtedly been the case—sometimes avowedly, and sometimes without any acknowledgment having been made by the judges and jurists who have resorted to that fertile mine of legal knowledge for reasons for their decisions, or for the resolution of their doubts. But in the great majority of instances it is quite evident that the uniformity of principle and decision has arisen from the uniformity of circumstances; that similar causes have produced similar effects, and that the same conclusions, founded on natural reason and justice, have naturally been deduced, by learned and just men, from the same premises.

The Law of Contracts may justly, indeed, be said to be a universal law adapted to all times and races, and all places and circumstances, being founded upon those great and fundamental principles of right and wrong which are immutable and eternal, and which present “a striking uniformity among all nations, whatever seas or mountains may separate them, or how many ages soever have elapsed between the periods of their existence;” being “widely different from those laws which, proceeding merely from positive institution, are consequently as various as the wills and fancies of those who enact them.” (a)

It has been observed by modern writers, that the laws of the Romans, if closely and attentively studied, will be found to form a more interesting part of their history than their victories and their conquests. Cicero, indeed, recommends them to the notice of his countrymen as containing a faithful portraiture of ancient manners, and as inculcating the soundest principles of morals; and in these days

(a) Sir William Jones. Introduction to the Speeches of Isæus.

they may be resorted to with advantage by all who are desirous of investigating the true sources of juridical science, and of studying the grounds and reasons upon which all civil laws are founded. It is not by treasuring in the memory a string of positive enactments or arbitrary rules, but by the study of general principles, or as Littleton saith, by the arguments and reasons of the law, that a man shall come to the certainty and knowledge of the law: "for the law is unknown to him that knoweth not the reason thereof." (b)

There are, undoubtedly, many able and learned works devoted either wholly or partially to the development of the subjects treated of in the present volume; and the Author may be liable to the charge of presumption, and of trespassing on ground already occupied, in venturing to add the present treatise to the number of those publications. The subject, however, though not intact, is far from being exhausted, and when we compare the existing publications in our language upon this important branch of law with the elaborate and elegant works of Pothier, and the varied and profound researches of continental jurists, it is evident that much still remains to be done amongst ourselves for the elucidation and development, in a generally intelligible and popular form, of the rules and principles of the Law of Contracts.

INNER TEMPLE,
March, 1847.

(b) Co. Litt. 306.

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THE LAW OF CONTRACT

BOOK I THE LAW OF CONTRACT IN GENERAL

CHAPTER I THE FORMATION OF CONTRACTS

SECTION I OF THE SEVERAL KINDS OF CONTRACTS

I. *Nature and Definition of a Contract.*—A contract is defined by Pothier to be “an agreement by which two parties mutually promise and engage, or one of them only promises and engages to the other, to give some particular thing, or to do or abstain from doing some particular act.”¹

¹ The term *obligation* has two significations: in its more extensive signification, it is synonymous to *duty*, and comprises imperfect as well as perfect obligations. Those obligations are called imperfect, for which we are accountable to God alone; and of which no person has a right to require the performance. Such are the duties of charity and gratitude. The giving of alms, for instance, from our superfluities, is a real *obligation*, and the neglect of it is a high offense: but it is an imperfect obligation, as we are accountable for it to God only; when the obligation is discharged, the person who is the object of it receives the alms, not as a debt, but as a benefit. It is the same with the duty of gratitude: he who has received a signal benefit is obliged to render his benefactor all

Every contract includes a concurrence of intention between two parties, one of whom promises some-

the services in his power, when occasion offers for his doing so; and it is sinful and dishonorable to neglect it; but the benefactor has no right to claim such services; and when they are rendered he receives them, in his turn, as a benefit. If my benefactor has a right to demand that I should render him, upon the like occasion, the same service which he has rendered me, the assistance I received, would be no longer a benefit, but a bargain; and the service which I render in return would no longer be entitled to the name of gratitude, the essence of which consists in its being voluntary. The term *obligation*, in a more proper and confined sense, comprises only perfect obligations, which are also called personal engagements, and which give the person with whom they are contracted a right to demand their performance.—Pothier, *Obligations*, § 1.

The law of contracts, in its widest extent, may be regarded as including nearly all the law which regulates the relations of human life. Indeed it may be looked upon as the basis of human society. All social life presumes it and rests upon it: for out of contracts, express or implied, declared or understood, grow all rights, all duties, all obligations, and all law—almost the whole procedure of human life implies, or rather, is the continual fulfillment of contracts. Even those duties, or those acts of kindness and affection, which may seem most remote from contract or compulsion of any kind, are nevertheless within the scope of the obligation of contracts. The parental love which provides for the infant, when in the beginning of life it can do nothing for itself, would seem to be so pure an offering of affection, that the idea of a contract could in no way belong to it. But even here, although these duties are generally discharged from a feeling which borrows no strength from a sense of obligation, there is still such an obligation. It is implied by the cares of the past, which have perpetuated society from generation to generation; by that absolute necessity which makes the performance of these duties, the condition of the preservation of human life; and by the implied obligation on the part of the unconscious objects of this care, that when, by its means, they shall have grown into strength, and age has brought weakness upon those to whom they are thus indebted, they will acknowledge and repay the debt. Indeed, the law recognizes and enforces this obligation

thing to the other, who on his part accepts such promise; but it does not necessarily include a mutu-

to a certain degree on both sides, as will be seen hereafter.—
1 Parsons on Contracts (5th ed.), p. 3.

This contract or agreement may be either express or implied. Express contracts are where the terms of the agreement are openly uttered and avowed at the time of the making: as to deliver an ox, or ten loads of timber, or to pay a stated price for certain goods. Implied, are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform.—Black. Com. ii. 443.

Any legal tie which imposes the necessity of doing, or abstaining from doing, any particular act.—Chitty on Contracts, § 1, p. 1.

The whole practice of our English common law—if we except their criminal jurisdiction and their administration of the law of real property—to which may be added those cases which fall within the fiscal jurisdiction of the Court of Exchequer—may be distributed into two classes: Contracts and Torts. Of this you can easily satisfy yourself by putting to your own minds any conceivable case of legal inquiry. If it do not involve a question of criminal law, or of the title to land, or of Exchequer jurisdiction, you will find that it resolves itself into a contract or a tort.—Smith on the Law of Contracts, Lecture 1, 1.

All jurists agree, in general terms, to recognize as the leading principle of the law of contracts, that good faith must be preserved, and that fraud or art on either side affords sufficient grounds for the interference of the law to protect or relieve the injured party. . . . In some cases . . . legislators and judges—from the apparent necessity of the case, or as Chief-Justice Marshall words it, “from the difficulty of our circumscribing the opposite doctrine within proper limits”—have considered the question, not so much on the ground of justice as of policy and convenience, and refused to lend the aid of the law to relieve against unequal contracts, leaving the protection of each man’s right, under such circumstances, to his own prudence and foresight. With regard to the moral obligation of our conduct, they expressly distinguish between the coarse and imperfect morality which they are willing to enforce at their own tribunal, and the sterner decrees of the Interior Forum—for so the Roman law, by a noble metaphor, has termed the decisions of an enlightened conscience.—An

ality or reciprocity of contract and liability. There must be two parties to every contract, a promisor or party making the promise, and a promisee or party to whom the promise is made; but there may be only one contracting party. Thus, if A promises to pay B the price of goods to be sold by the latter to C, B contracts no obligation to sell goods to C, though, if he does, the liability of A attaches, and his engage-

Essay on the Doctrine of Contracts, being an Inquiry how Contracts are affected in Law and Morals, &c. By Julian C. Verplanck. New York, 1826.

Primarily, the law of contracts pertains to single specific agreements, such as a promissory note, a sale, or a policy of insurance. But in addition to this class of subjects, there is also that other division of contracts, which consists rather in permanent relations, than in single agreements. Such is the contract of partnership, involving the numerous points which go to make up so large a body of law on that *relation* alone. Such is the contract of marriage, involving the complicated rights and liabilities of husband and wife, as between themselves and in reference to third persons. So the *relation* of master and servant is the result of a contract, and therefore requires to be treated as such.—1 Hillard on Contracts, p. 3.

A contract is a deliberate engagement between competent parties, upon a legal consideration, to do or to abstain from doing some act.—1 Story on Contracts, § 1, 1.

A contract is an agreement, upon a sufficient consideration, to do or not to do a particular thing.—Newland on Contracts, 1, 1.

Says Judge Metcalf (Essay on Contracts), The most concise definition of a contract to be found in the books, is that given by the late Chief-Justice Marshall in *Tenigis v. Crown-inshield* (4 Wheat. 197): "A contract is an agreement between two or more parties for the doing or not doing of some specified thing."

Obligamur aut re, aut verbis, aut simul utroque, aut consensu, aut lege, aut jure honorario, aut necessitate, aut peccato.—Pandectæ Justinianæ.

The word "contract" as occurring in certain statutes, acts, or contexts, may vary in signification. See *Gay v. State*, 7 Kan. 394; *Jones v. Adams*, 46 Ga. 605; *Pelham v. State*, 30 Tex. 422; *Hollister v. Young*, 42 Vt. 403; 1 Com. Dig. 419.

ment becomes absolute and binding. When there is a mutual contract binding each party to the other, the contract is bilateral. When the contract binds one person to another without any engagement being made by the latter, it is unilateral. Contracts, also, are either principal or accessorial. The first are those which are entered into by the parties on their own account as principals; the second are those which are entered into for assuring the performance of another principal contract, such as guarantees or engagements of sureties. Contracts, whether bilateral or unilateral, principal or accessorial, are made and authenticated either by parol, by deed, or by matter of record.

2. *Parol or simple contracts* are contracts which are either made by word of mouth, or are inferred from the silent language of men's conduct and actions, or are put into writing and signed by the parties to them, but are not sealed and delivered, and can not be enforced unless they are founded upon some good or valuable consideration. Thus, in order to maintain an action for the breach of a promise or undertaking not under seal, the party making the promise must have suffered some loss, or sustained some injury or inconvenience, in consequence of the making and acceptance of the promise. This rule has been wisely established by the law for the purpose of protecting weak and thoughtless persons from the consequences of rash, improvident, and inconsiderate engagements. (a)¹

(a) "Tantum meminerimus distinguendas esse promissionas serias, medietas et utiles ab inconsideratis, temerariis, atque inutilibus, cum quis non dispositive, ut loquuntur, nec serio sed vel narrative, vel per jocum, et

¹ Stackpole v. Arnold, 11 Mass. 30; Ballard v. Walker; 3 Johns. Cas. 65; Perrine v. Cheseman, 6 Halst. 174; Cook v. Bradley, 7 Conn. 57; De Beerski v. Paige, 47 Barb. 172.

3. *The consideration—Absence of consideration.*—
Gratuitous promises and undertakings, not clothed
with the formalities prescribed by the civil law to

aliud agens aliquid pronuntiat, ud ex wood v. Kenyon, 11 *Ad. & E.*
illis tantum, non ex his, obligatio et 450, 451; *Story on Bailments*, 120,
actio oriuntur."—*Vinnius*, 661; East- 121.

Olmstead v. Mansir, 10 Allen, 424; Luckhart v. Ogden, 30 Cal. 547; Pounds v. Richards, 21 Ala. 424; Lang v. Johnson, 24 N. H. 14; Fost. 1302; People v. Shall, 9 Cow. (N. Y.) 778; Burnett v. Bisco, 4 Johns. (N. Y.) 235; Thatcher v. Dinsmore, 5 Mass. 301; Brown v. Adams, 1 Stew. (Ala.) 51; Beverleys v. Holmes, 4 Munf. (Va.) 95; Clark v. Small, 6 Yerg. (Ten.) 418; Roper v. Stone, Cooke (Ten.) 497; Perrine v. Chese-man, 11 N. J. L. (6 Hals.) 174; Mosby v. Leeds, 3 Call. (Va.) 439; Doebler v. Waters, 30 Ga. 344; Lowe v. Bryant, 32 Id. 235; Sharpe v. Rogers, 12 Min. 174; Aldridge v. Turner, 1 Gill. & J. (Md.) 427; Lenney v. Prime, 4 Pick. (Mass.) 385; 7 Pick. 243; Bailey v. Walker, 20 Miss. 407; and see Thorne v. Deas, 4 Johns. (N. Y.) Cas. 331; Justice v. Lang, 52 N. Y. 329; Pullan v. Easton, 6 Lans. (N. Y.) 242; Randle v. Harris, 6 Yerg. 508; Burnett v. Bisco, 4 Johns. (N. Y.) 235; Little-john v. Patillo, 2 Hawks (N. C.) 302; Washington, &c. Bank v. Farmers' Bank, 4 Johns. (N. Y.) 62; Chandler v. Johnson, 39 Ga. 85; Philpot v. Gruninger, 14 Wall, 570; Sykes v. Laf-frey, 27 Ark. 487.

A party to a contract, after receiving the benefits thereof is estopped from affirming that the same was not to be binding unless reduced to writing. Miller v. McMannis, 57 Ill. 126. Conover v. Stilwell, 34 N. J. L. 54. An inconvenience to the promisee constitutes a consideration quite as effectual as a benefit to the promisor. Glasgow v. Hobbs, 32 Ind. 440.

The settlement of a dispute in regard to a claim for dam-ages is a sufficient consideration for a promise to pay a cer-tain sum in satisfaction of the claim. Scott v. Warner, 2 Lans. (N. Y.) 49; Powers v. Freeman, Id. 127; Larmon v. Jordan, 56 Ill. 207; Miller v. McMannis, 57 Ill. 126; Schreiner v. Cummings, Pa. St. 374; Mechanics, &c. Bank v. Wixson, 42 N. Y. 438; Nash v. Luce, 102 Mass. 60; How v. Richards, Id. 64 (n.); State, &c. Bank v. Walser, 86 Mo. 348; Bruner v. Wheaton, 46 Mo. 363; Bruce v. Bishop, 43 Vt. 161; Mayer v. United States, 5 Ct. of Cl. 317; Gibbons v. Same, Id. 416; Wilder v. Same, Id. 468; Daubenspeck v. Powers, 32 Ind. 42

render them legally binding, were termed by the civilians *nuda pacta*, or naked engagements, and did not induce any legal rights; for it was thought better we are told, to let such contracts rest upon the mere integrity and good faith of the parties who contracted them, than to subject them to the compulsory authority of the law. (b)¹ Bracton, who wrote in the time of

(b) *Vin. Com. de Instit.*, 658, 659, ed. 1755. *Plowd.*, 309, a.

¹ *Id.* and *Cole v. Shurtleff*, 41 Vt. 311; *Russel v. Buck*, 11 Vt. 156; *Phalan v. Stiles*, 11 Vt. 82; *Tooke v. Bonds*, 29 Tex. 419; *Pope v. Fort*, 2 McMull, (S. C.) 60; *Smith v. Whildin*, 10 Pa. St. 39; *Logan v. Mathews*, 6 Pa. St. 417; *McClure v. McClure*, 1 Pa. St. 374; *Hartman's appeal*, 3 Grant (Pa.) Cas. 271; *Sweaney v. Hunter*, 1 Murph. (N. C.) 181; *Kellogg v. Olmstead*, 28 Barb. (N. Y.) 96; *Dygert v. Gros*, 9 Barb. (N. Y.) 506; *Chaffee v. Thomas*, 7 Cow. (N. Y.) 358; *Doolin v. Ward*, 6 Johns. (N. Y.) 194; *Goodale v. Holrige*, 2 Johns. (N. Y.) 193; *Watts v. Frenche*, 19 N. J. Eq. (4 Greene) 407; *Jennes v. Lane*, 26 Me. 475; *Fairchild v. Warren*, 21 How. (N. Y.) Pr. 187; *Hyams v. Levy*, 1 Shear (S. C.) 368; *Stryker v. Vanderbilt*, 27 N. J. L. (3 Dutch, 68); *Gibson v. Irby*, 17 Tex. 173; *Smith v. Mudgett*, 20 N. H. 527; *Woodburn v. Renshaw*, 32 Mo. 197; *Chavin v. Labarge*, 1 Mo. 566; *Colter v. Greenhagen*, 3 Minn. 126; *Palfrey v. Portland, &c. R. R. Co.*, 4 Allen (Mass.) 55; *Sears v. Lawrence*, 15 Gray (Mass.) 267; *Dearborn v. Bowman*, 3 Metc. (Mass.) 155; *Valentine v. Foster*, Id. 520; *Smith v. Bartholemew*, Id. 276; *Commonwealth Ins. Co. v. Whitney*, Id. 276; *Ehle v. Judson*, 24 Wend (N. Y.) 97; *Dodge v. Adams*, 19 Pick. (Mass.) 429; *Williams v. Hathaway*, Id. 387; *Bailey v. Walker*, 29 Mo. 407; *Allen v. Woodward*, 22 N. H. (2 Fost.) 542; *Livingston v. Rodgers*, Col. & C. (N. Y.) Cas. 331; *University v. McNair*, 2 Ired. (N. C.) Eq.; *Good v. Good*, 3 Watts & S. (Pa.) 472; *Snyder v. Liebgood*, 4 Pa. St. 305; *Coggeshal v. Coggeshal*, 1 Strobb. (S. C.) 43; *Dorsey v. Packwood*, 72 How. 126; *Shirley v. Harris*, 3 McL. 330; *McCaleb v. Price*, 12 Ala. 753; *Overdeer v. Wiley*, 80 Ala. 709; *Johnson v. Sellers*, 33 Ala. 265; *Shaver v. Bear River, &c. Co.* 10 Cal. 396; *Jones v. Shorter*, 1 Ga. 294; *Molyneaux v. Collier*, 13 Ga. 406; *Mendenhall v. Lenwell*, 5 Blackf. (Ind.) 125; *Lowe v. Blair*, 6 Id. 282; *Norris v. Slaughter*, 3 Iowa, 116; *Roberts v. Waters*, 9 Iowa, 434; *Agnew v.*

Hen. 3, is the first of our lawyers who treats of naked promises and promises clothed with a consideration, and advocates, in the language of the civilians, the well-known principle, "*ex nudo pacto non oritur actio.*" (c)¹ In "*Doctor and Student*" it is observed, "A nude or naked promise is where a man promiseth another to give him certain money such a day, or to build a house, or to do him such certain service, and nothing is assigned for the money, for the building, or for the service. These be called naked promises, because there is nothing assigned why they should be made; and I think no action lieth in those cases, though they be not performed. . . . Also, if I promise to another to keep him such certain goods safely to such a time, and after I refuse to take them, there lieth no action against me for it; for, if the promise be so naked that there is no manner of consideration why it should be made, then is a man not bound to perform it; for it is to suppose that there was some error in the making of the promise." (d)²

(c) *Bracton*, lib. 3, cap. 1, fol. 99, ed. 1569. 24. *Shep. Touch.* 224, 225. *Elssee v. Gatward*, 5 T. R. 143, 148.

(d) *Doct. and Stud. Dial.* 2, chap.

Williams, 1 *Bush.* (Ky.) 4; *Bean v. Burbank*, 16 *Me.* 458; *Warren v. Whitney*, 24 *Me.* 561; *Sowerwein v. Jones*, 7 *Gill & J.* (Md.) 335; *Warren v. Stearns*, 19 *Pick.* (Mass.) 73; *Kleinpeter v. Hanigan*, 21 *La. An.* 196; *Chapman v. Brooklyn*, 40 *N. Y.* 372; *Tilden v. New York*, 56 *Barb.* (N. Y.) 340; *Hart v. Young*, 1 *Lans.* (N. Y.) 417.

¹ No cause of action arises from a bare promise. *Broom. Leg. Max.* 745.

² *Doebler v. Waters*, 30 *Ga.* 344; *Sherman v. Barnard*, 19 *Barb.* 291; *Silvernail v. Cole*, 12 *Barb.* 685; *Story on Contracts*, § 427; *Story on Bills*, §§ 180, 437, 453, 465, 480; *Cabot v. Haskins*, 3 *Pick.* (Mass.) 83; *Warder v. Tucker*, 7 *Mass. R.* 449; *Freeman v. Boynton*, *Id.* 483; *Beall v. Ridgeway*, 18 *Ala.* 117; *Comstock v. Breed*, 12 *Cal.* 286; *Cutler v. Everett*, 33 *Me.* 201; *Elliot v. Gese*, 7 *Har. & J.* (Md.) 457; *Tenney v. Prince*, 4 *Pick.* (Mass.) 387; *Bailey v. Freeman*, 4 *Johns.* (N. Y.)

A promise to give any particular thing, such as a horse or a colt, or a watch, to another, unaccompanied by an actual or constructive transfer or change of possession, is a mere nudum pactum, and can not be enforced by compulsion of law." (*e*) A promise by one man to pay a debt already incurred by another, is a nudum pactum; and so also is a promise by a creditor to accept less than the full amount of an admitted debt, or to give time for the payment thereof; (*f*) also a promise to pay money to a person not entitled to receive it; (*g*) a promise by the heir to pay the bond of his ancestor, when the heir is not bound by the bond;¹ a promise by a widow to pay her husband's debts, or to pay a note given by her when under coverture; (*h*) and a promise, on the abandonment of an immoral connection with a woman, to pay her a sum of money, or an annuity, in consideration that

(*e*) *Donaldson v. Donaldson*, Kay, Latch. 142. *Fabian v. Plant*, 1 Show. 718. *Milroy v. Lord*, 31 L. J., Ch. 798. By the civil law gifts were required to be publicly registered. Cod. lib. 8, tit. 54. Dig. lib. 42, tit. 8.

(*f*) *Fitch v. Sutton*, 5 East, 232. *Pinnell's case*, 5 Co. 117 a, 117 b. *Cooper v. Phillips*, 1 C. M. & R. 649.

(*g*) *Clay v. Willis*, 1 B. & C. 364.

(*h*) *Barber v. Fox*, 2 Saund. 135, 137, h. 1 Vent. 159. *Lloyd v. Lee*, 1 Str. 94. *Goodwin v. Willoughby*, 576. 34 L. J., Exch. 85.

280; *Leonard v. Vreedenburgh*, 8 Id. 29; *Pfeiffer v. Kingsland*, 25 Mo. 66; *Reading R. R. v. Johnson*, 7 Watts. & S. 66; *Gilman v. Kibler*, 5 Humph. (Tenn.) 19.

¹ A promise in writing by a son to pay a pre-existing debt of his father's, no consideration existing between the son and the creditor. *Parker v. Carter*, 4 Munf. (Va.) 273; and see *Chandler v. Neale*, 2 Hen. & M. (Va.) 124.

Where one enters into service at a fixed salary—a promise to increase the salary if the conduct of the employed should merit such increase, is a mere nudum pactum. *Johnnie v. Dean*, 1 Wash. Ter. 57.

she will thenceforth lead a good and virtuous life. (i') And, where a specific sum is fixed as the price of goods sold and delivered, or as an agreed remuneration for work and services, a subsequent promise, without any new consideration, to pay an additional sum for the same work or the same services is a nudum pactum. (k)'

(i) *Binnington v. Wallis*, 4 B. & Ald. 650. *Parke, B., Jennings v. Brown*, 9 M. & W. 501. *Beaumont v. Reeve*, 15 L. J., Q. B. 142. (k) *Harris v. Watson, Peake, R.* 102. *Brown v. Crump*, 1 Marsh. 567. *Newman v. Walters*, 3 B. & P. 612.

' So, also, a promise by a solicitor to pay the costs of a suit instituted by him (*Files v. McLeod*, 14 Ala. 611). Or where several have become liable for the fees of counsel employed to defend a suit, a promise by another, not a party, to share in the payment, even though it appears he was interested in the question (*Flemm v. Whitmore*, 23 Mo. 430). Where an attorney has collected money, is directed to detain out of it his fee, and the owner of the claim afterwards assigns the whole claim to another, and the attorney promised to pay it to the assignee, it was held that he might, notwithstanding, retain the amount due him, his promise being a nudum pactum (*Taylor v. Bates, Cow. (N. Y.) 376*). And so undertakings to pay money upon the occurrence of an event which is not to be brought about by the promisee (*Stewart v. Trustees of Hamilton College*, 2 Den. (N. Y.) 403); or which has no other consideration than the naked promise of another to do in a few days what he is, by law, bound to do instantanly (*Farrington v. Bullard*, 40 Barb. (N. Y.) 512); of a purchaser at a sheriff's sale to secure to the wife of the debtor the balance of any of the price he should obtain for the property, after reimbursing himself (*Heathman v. Hall*, 3 Ired. (N. C.) Eq. 414); or to warrant of better quality, that which one has already sold and delivered as of a stipulated quality, without further consideration (*McDugald v. McFadgin*, 6 Jones (N. C.) L. 89); or made in consideration of usury (*Cornwell v. Holly*, 5 Rich. (S. C.) 47); to convey lands in consideration of the purchaser's paying for them out of the profits of the lands (*Dorsey v. Packwood*, 12 How. 126); to pay ten per cent. if a certain note, given some time before, should not be paid punctually when due (*Shirly v. Harris*, 3 McLean 330) to pay a sum of

A promise or agreement to make a duty, of a limited nature, more extensive, and to undertake a

money for the delivery of a valuable paper, to which the person in possession has no claim, but which belongs to another. [Nor will it vary the case that the note which was given for the production of the paper was made payable to a third person.] (*McCaleb v. Price*, 12 Ala. 753); by a master to pay stolen money received by his slave which has not come into his own hands (*Jelks v. McRae*, 25 Ala. 440); by a creditor, in consideration of the execution of a note by his debtor for a debt already due, to supply him with goods in future (*Overdeer v. Wiley*, 80 Ala. 709); to forbear giving no new rights to a holder (*McCann v. Lewis*, 9 Cal. 246); to release a debtor in consideration of the promise of a married woman to assume the debt, notwithstanding that she paid part of the debt, which payment was duly endorsed, with consent of the creditor (*Shaver v. Bear River, &c. Co.*, 10 Cal. 396); an agreement between a plaintiff and one of three defendants, that he shall be discharged on payment of a part (*Molyneaux v. Collier*, 13 Ga. 406); on the part of a creditor voluntarily not to call on one of two obligors for more than half the sum (*Lemaster v. Burckhart*, 2 Bibb. (Ky.) 27); on the part of a husband to pay a debt of his wife made before marriage, in order to obtain possession of her property. [Unless the creditor of the wife had a lien upon such property.] (*Agnew v. Williams* 1 Bush. (Ky.) 4); to pay a debt voluntarily discharged (*Warren v. Whitney*, 24 Me. 561); by the holder to one of the makers of a promissory note, who had partly paid it, that he would look for payment of the residue to the other maker (*Smith v. Bartholemew*, 1 Metc. (Mass.) 276); to pay a demand which the promisee had released, to enable the promisor to become a witness (*Valentine v. Foster*, 1 Metc. (Mass.) 520); a note given by a candidate for an elective office, for services in promoting his election, but not rendered at his request (*Dearborn v. Bowman*, 3 Metc. (Mass.) 155); a promise to pay where there is no legal obligation under certain circumstances (*Logan v. Mathews*, 6 Pa. St. 417; *Bean v. Burbank*, 16 Mo. 458; *Chauvin v. Laborge*, 1 Mo. 556; *Woodburn v. Penshaw*, 32 Mo. 197; *Stryker v. Vanderbilt*, 27 N. J. L. (3 Dutch.) 68; *Gibson v. Joby*, 17 Tex. 173; *Wates v. Frenche*, 19 N. J. Eq. 4 (Green), 407; *Jenness v. Lane*, 26 Me. 475; *Fairchild v. Warren*, 21 How. (N. Y.) Pr. 187; *Hyams v. Levy*, 1 Shear. (S. C.) 368.)

Agreements between two persons not to bid against each

greater liability than is imposed by law upon the party making the promise, is a nudum pactum, unless there be some fresh consideration. The promise of an executor or administrator, for example, to pay the debt of his testator or intestate, (*l*) does, in no degree, alter or extend his liability. The executor does not, by such a promise, render himself personally liable, but is only chargeable to the amount of his assets.

4. *Insufficient considerations*.—Neither “love and affection,” nor “blood relationship,” (*m*) nor “friendship,” nor any mere moral duty or obligation, nor any voluntary courtesy, constitute a sufficient cause or consideration for the fulfillment by coercion of law of an undertaking or promise not under seal. (*n*) The moral obligation which a parent is under to provide for his child, imposes on him no liability to pay the debts incurred by the child; and he can not be made liable in respect thereof, unless he has given the child authority to incur them, or has contracted to pay them, (*o*)

(*l*) *Pearson v. Henry*, 5 T. R. 6. 413. *Lampleigh v. Braithwaite*, Hob. Rann v. Hughes, 7 T. R. 350, n. 105.

Mitchinson v. Hewson, Id. 348.

(*m*) *Tweddle v. Atkinson*, 1 B. & S. 393.

(*n*) *Harford v. Gardner*, 2 Leon. 30.

Holliday v. Atkinson, 5 B. & C. 501;

8 D. & R. 163. *Cluff v. Moore*, 1 Sid.

(*o*) *Mortimore v. Wright*, 6 M. &

W. 482. *Seaborne v. Maddy*, 9 C. &

P. 497. *Urmston v. Newcomen*, 4

Ad. & E. 899; 6 N. & M. 454. *Shel-*

ton v. Springett, 11 C. & B. 452.

Ruttinger v. Temple, 33 L. J., Q. B. 1.

other at an auction (*Doolin v. Ward*, 6 Johns. (N. Y.) 194); or to pay one half of a joint judgment (*Dygert v. Gros*, 9 Barb. (N. Y.) 506); or to save a witness harmless as to a forfeiture for failing to attend at a former term, on consideration of his attending at the next (*Sweany v. Hunter*, 1 Murph. (N. C.) 181); or by a father to give his son certain land in his will (*McClure v. McClure*, 1 Pa. St. 374), are each nudum pactum. And so will be a parol-agreement between the makers and payee of a promissory note, after its maturity, that the payee will extend the time of payment until a certain time, if the makers will keep the sum until that time and pay interest on it (*Kellogg v. Olmstead*, 28 Barb. (N. Y.) 96).

or the child has become chargeable upon the parish, and the parish authorities sue for subsistence money in the mode provided by the poor laws. Very slight evidence has, however, been held sufficient, under certain circumstances, to warrant a jury in inferring the existence of an authority from the parent, so as to fasten a just liability upon the latter.

(*p*) The mere putting an end to "certain disputes and controversies," or ceasing to make complaints, or to bore or annoy a man, is an insufficient consideration or foundation in law for an express promise. (*q*)¹

The performance of an act which the party is under a legal obligation to perform can not constitute a good consideration for a promise.² "If," for example, "a debtor, being bound by law to give up the title-deeds of an estate to a purchaser, pursuant to a decree of sale, enters into an agreement with the purchaser to deliver them to him on payment of a sum of

(*p*) *Law v. Wilkin*, 6 Ad. & E. 712; (*q*) *Edwards v. Baugh*, 11 M. & W. 1 N. & P. 697. *Baker v. Keen*, 2 641. *Kaye v. Dutton*, 7 M. & Gr. Stark 501. *Blackburn v. Mackey*, 1 807; 8 Sc. N. R. 502. *White v. C. & P. 1.* *Bluett*, 23 L. J., Exch. 36.

¹ As a promise to reward a constable for arresting a criminal under a warrant, which he is by law bound to execute, *Smith v. Wheldin*, 10 Pa. St. 39—or a promise generally to pay on request, what the promisor was liable to pay on request—as e.g. a husband's parol-promise during coverture to pay an antenuptial debt of his wife. *Cole v. Shurtleff* 41 Vt. 311.

² As to moral obligations, see, generally, *Vance v. Wells*, 8 Ala. 399; *Montgomery v. Samplon*, 3 Metc. (Ky.) 519; *Miles v. Wyman*, 3 Pick. (Mass.) 207; *Cook v. Bradley*, 7 Conn. 57; *Loomis v. Newhall*, 15 Pick. (Mass.) 159; *Hawley v. Farrar*, 1 Vt. 420; *Udike v. True*, 13 N. J. Eq. (2 Beas.) 151; *Musser v. Ferguson*, 55 Pa. St. 475; *Cobb v. Cowdery*, 40 Vt. 25; *Shepard v. Rhodes*, 7 R. I. 470; *Glass v. Beach*, 5 Vt. 173; *Commissioners v. Perry*, 5 Ohio, 58; *Turner v. Partridge*, 3 Pa. 172; *Barlow v. Smith*, 4 Vt. 144; *Clark v. Herring*, 5 Binn. (Pa.) 33; *Dodge v. Adams*, 19 Pick. (Mass.) 429; *Ehle v. Judson*, 24 Wend. (N. Y.) 97.

money, the debtor is not only without any right of action for enforcing such an agreement, but, if the money is paid, he is himself subject to an action for the recovery of it back." (r) So, if a debt is released or discharged, the giving up of a deed or collateral security originally deposited with the creditor to secure the payment of the debt can not form a good consideration for a promise; for, by the release of the debt, the security is released, and the creditor is no longer justified in retaining it. (s) But the performance of an act a person has agreed with another to perform is a good consideration to support a promise by a third person, if the latter derives a benefit from the performance. (t)

If a debtor, by paying part of his debt, obtains from his creditor an agreement to discharge the residue, such an agreement is a nudum pactum and totally inoperative, (u) unless the debt be unliquidated, or some doubt exists as to the exact amount due, (x) because the debtor is under a legal obligation to pay the whole demand.¹ A promise to pay money

(r) Pothier, by Evans, p. 25.

(u) *Cumber v. Wane*, 1 Str. 425.

(s) *Cowper v. Green*, 7 M. & W. 641.

(x) *Wilkinson v. Byers*, 1 Ad. &

(t) *Scotson v. Pegg*, 6 H. & N. 295;
30 L. J., Exch. 225.

E. 113. 1 *Smith's Lead*, Cas. p.
291.

¹ A promise by one to pay part of another's debt, in discharge of the whole, does not discharge it, and is therefore without consideration, unless that other is a party to the agreement. *Whelan v. Edwards*, 29 Ga. 315. A. being indebted to B., C. verbally promised B. to pay him the sum and charge it to A. without his consent. Held, that since B. had not released nor assigned his debt, the promise was without consideration. *Richardson v. Williams*, 49 Me. 558. The donors of a trust fund reserved to themselves the power of controlling it. One only of the donors, who was acting trustee of the fund, promised the cestui que trust to pay over the fund to her. Held, a promise without consideration. *Vincent v. Gorham*, 3 Metc. (Mass.) 343. If a debt is paid by indorsing over a note, a bare

to a sheriff, in consideration of his executing a writ, is also a nudum pactum; and so, also, is a promise to pay money to a witness regularly subpoenaed to give evidence at a trial, as a compensation for his loss of time; because, in each of these cases, the parties are bound by law to do the acts in question, without compensation or reward. (*y*)¹ It has been held, also, that a promise to pay money to the crew of a vessel, as an incitement to exertion during a storm, is a nudum pactum, and can not be enforced, because the sailor is bound to do his utmost to save and preserve the vessel; (*z*) but if any extraordinary and additional services have been rendered, beyond what the parties were in strictness bound to perform, there is a sufficient foundation for the promise, and the law will enforce its faithful performance. (*a*) If, therefore, a vessel is so short-handed as to render it dangerous to life to proceed to sea, and the crew are, not bound under their articles to sail with so small a complement of seamen, a promise of additional remuneration in consideration of the increased risk is valid and binding. (*b*) A promise not to abuse the process of the law, as, for instance, to conduct proceedings in bankruptcy so as

(*y*) *Bridge v. Cage*, Cro. Jac. 103. *Stilk v. Myrick*, 2 Campb. 317; 6 Esp.
Willis v. Peckham, 4 Moore, 300. 129. *Newman v. Walters*, 3 B. & P.
Collins v. Godefroy, 1 B. & Ad. 956. 615.
Dixon v. Adams, Cro. Eliz. 538. (*a*) *England v. Davidson*, 11 Ad. &
Jackson v. Cobbin, 8 M. & W. 797. E. 856.
Nokes v. Gibbon, 26 L. J., Ch. 208. (*b*) *Hartley v. Ponsonby*, 7 Ell. A
(*s*) *Harris v. Watson*, Peake, 102. Bl. 872; 26 L. J., Q. B. 322.

promise, after its dishonor to pay the debt, is void for want of consideration. *Wright v. Clark*, 34 Miss. 116.

¹ So a promise by a constable to a defendant against whom he has an execution issued from a justice's court, that, if the defendant will deliver property as security, he will not sell it under thirty days, is void. *Goodale v. Holenge*, 2 Johns (N. Y.) 194.

to avoid, as far as possible, injury to the debtor.
(c)¹

5. *Bygone transactions*.—Bygone transactions can not be made a good consideration for a promise. A promise, for example, to pay the plaintiff £20 in consideration that the plaintiff “had delivered” to the defendant twenty sheep, or a promise to lend the plaintiff £20 in consideration that the plaintiff “had formerly lent” that sum to the defendant, is a nudum pactum, and incapable of sustaining an action, (d) for the thing having been done and executed before the promise was made, can not be said to be a consideration for it;² but, if the act has been performed pursuant

(c) *Bracewell v. Williams*, L. R., 2 442. *Doggett v. Vowell*, Moore, 643; C. P. 196. Id. 220. *Bacon's Abr. Assumpsit*, D 67. *Jeremy v. Goochman*, Cro. Eliz. *Eastwood v. Kenyon*, 11 Ad. & E. 451.

¹ And so a promise to pay money in consideration of a forbearance to sue, when there was no cause of action for a suit (*Palfrey v. Portland, &c. R. R. Co.*, 4 Allen (Mass.) 55); or a promise made by one to perform a duty which another had, for good consideration, previously undertaken, or to induce one to comply with an existing valid contract with a stranger, are without consideration (*Smith v. Mudgett*, 20 N. H. 527; *Johnson v. Sellers*, 33 Ala. 265).

² A promise to indemnify a surety on a bond, after the bond has been executed, and without any consideration, is void (*Jones v. Shorter*, 1 Ga. 294); so too, a contract to give security for a note, made after the making of the note (*Roberts v. Waters*, 9 Iowa, 434); a promissory note given by an endorser to an acceptor of a bill, after its payment by the acceptor, unless such endorsement was made for the purpose of saving the acceptor harmless from his acceptance, and the note was given in pursuance of that understanding (*Sowerwein v. Jones*, 7 Gill. & J. (Md.) 335); or a subsequent promise by a vendee of land sold for an entire sum to make a deduction from the purchase-money, if there was any deficiency in the estimated quantity of land (*Williams v. Hathaway*, 19 Pick. (Mass.) 387); or a promise in writing to pay the debt of another, acknowledging a past consideration, viz., land conveyed to such other

to the previous request of the party making the promise, then the promise is coupled to the consideration by the request, and is not a nudum pactum. (*e*) And, when the defendant has received and retains the benefit of the consideration, the law will imply a request, or permit the jury to infer it, for the purpose of enforcing a meritorious claim. (*f*)

6. *Failure of consideration.*—Although there be an apparent consideration for the promise, yet, if this consideration should turn out to be false, or to be a nullity, the contract has no legal force or effect, as in the instance put by Pothier. "If upon the false supposition that I owe you £1,000 left you by the will of my father, which has been revoked by a codicil, whereof I am not apprised, I engage to give you a certain estate in discharge of that legacy, the contract is null; and the falseness of the cause being discovered, you are not only without any right of action to compel me to deliver the estate, but, even if I have delivered it, I am entitled to reclaim it; and my right of action by the Roman law was called *condictio sine causa*, which is the subject of the title in the digest." (*g*) So, if the consideration prove to be a nullity, the promise founded upon it is void,¹ as if the con-

(*e*) Post p. 9.

(*g*) Pothier on Obligations, p. 1., c.

(*f*) Post p. 9, and bk. 2, ch. 1, art. 3, § 6. *Gough v. Findon*, 7 Exch. 48.

person, but not at the promisor's request (*Chaffee v. Thomas*, 7 Cow, (N. Y.) 358), are void as for bygone transactions.

¹ As where money has been paid for an annuity which has been set aside, or become void for want of registry or enrolment (*Shore v. Webb*, 1 R. I. 732; *Semfield v. Gowland*, 6 E. 241); or where a sale of land for taxes is void for irregularities in the assessment (*Chapman v. Brooklyn*, 40 N. Y. 372); or where money has been paid to an auctioneer as a deposit, and the title to the estate sold turns out defective (*Burrough v. Skinner*, 5 Burr. 2639); so money paid as a premium upon

consideration be the forbearance of a suit when there is no cause of action,¹ or the relinquishment of a contract void in law, or a discharge from an arrest wrongfully and illegally made, or a promise to pay a debt which never had an existence in point of law. (*h*)²

7. *Written promises without consideration.*—No superiority was given, by the civil law, to a written contract over a contract by word of mouth. "For writing can not change the nature of it, neither can writing amount to a cause or consideration for the promise, but it is only made use of for proof. (*i*)"³ Where the defendant signed a written undertaking to the following effect, "I hereby agree to remain with Mrs. Lees for two years from the date hereof, for the purpose of learning the business of a dressmaker, &c.," it was held that, as the engagement was all on one side, nothing being contracted to be done or performed by Mrs. Lees as a consideration or inducement for the defendant's remaining two years in her service,

(*h*) Rosyer v. Langdale, Sty. 248. Ld. Raym. 1217. Cockrane v. Willis
Hammon v. Roll, March, 202. Atkin- L. R., 1 Ch. 58; 35 L. J., Ch. 36.
son v. Settree, Willes, 482. King v. (*i*) Dig. lib. 2, tit. 14, 7; lib. 44, tit.
Hobbs, Yelv. 25. Randal v. Harvey, 7, 61; lib. 22, tit. 4, 4. Cod. 4, tit. 30.
God. 358. Courtenay v. Strong, 2 Rann v. Hughes, 7 T. R. 350, 351 n.

a policy of insurance against a risk which was not incurred (Shephenson v. Snow, Burr. 1240), or for a void bond (Flynn v. Allen, 57 Pa. 482), may be recovered on account of failure of consideration; and see Allen v. Citizens, &c. 22 Cal. 28.

¹ Palfrey v. Portland, &c. R. R. Co., 4 Allen (Mass.) 55.

² So a note given in renewal of a note, invalid for want of consideration, is itself invalid.

³ So a promise in writing to pay a pre-existing debt of his father, without a new consideration moving between promisor and creditor (Parker v. Carter, 4 Munf. (Va.) 273; and see Chandler v. Neale, 2 Hen. & M. (Va.) 124); or an agreement under seal, made by the holder of a promissory note with the maker, not to sue on the note for a limited time after it came due (Mendenhall v. Lenwell, 5 Blackf. (Ind.) 125; Lowe v. Blair, 6 Id. 282).

it was held to be a nudum pactum. (*j*) So, where a memorandum of agreement was made in the following terms, "I, William Bradley, of Sheffield, do agree that I will work for and with John Sykes, of Sheffield, manufacturer of powder-flasks, at such work as he shall order and direct, and no other person whatsoever, from this day henceforth during and until the expiration of twelve months, and so on from twelve months' end to twelve months' end, until I shall give the said John Sykes twelve months' notice in writing that I shall quit his service," it was held that the agreement was a nudum pactum, and could not be enforced. (*k*)

8. *Valid considerations.—Works and services.*—By the civil law, if any one agreed to perform or effect anything (whether that consisted in giving or doing something, or omitting or withholding something) on the understanding that another in his turn should do something, or give or deliver something, or vice versa, the person in whose favor the thing executed was delivered or done was not permitted to be deficient in performing what was stipulated on his part, but was compelled to performance, so that, if there was a cause or consideration *facti vel traditionis*, a corresponding obligation or duty arose. So, by the common law, if anything is performed which the party is under no legal obligation to perform, or if anything is given or done at the request of the promisor, as the considera-

(*j*) *Lees v. Whitcomb*, 2 Moo. & P. 86; 5 Bing. 34.

(*k*) *Sykes v. Dixon*, 9 Ad. & E. 693; 1 P. & D. 463. *Bates v. Cort*, 3 D. & R. 676. *James v. Williams*, 5 B. & Ad. 1109. *Young v. Timmings*, 1 Cr. & J. 340. *Hulse v. Hulse*, 17 C. B. 725; 23 L. J., C. P. 177. But see *Pilkington v. Scott*, 15 M. & W. 657.

and *Whittle v. Frankland*, 2 B. & S. 57. Probably at the present day an agreement to employ and retain would be inferred in some cases from the terms of the contract. See *Hartley v. Cummings*, 17 L. J., C. P. 84. *Reg. v. Welch*, 2 El. & Bl. 355; 22 L. J. M. C. 145.

tion or inducement for the promise whereby the promisor or party making the promise has obtained or secured for himself some benefit or advantage, or whereby the promisee or party to whom the promise has been made has sustained some trouble or loss, or suffered some injury or inconvenience, there is a sufficient consideration to render the promise obligatory in law and capable of sustaining an action. The mere surrender and delivery of a letter or other written document, which the promisee has a right to keep and retain in his possession, is a sufficient consideration for the promise, although the possession of it may turn out eventually to be of no value in a pecuniary point of view, or no benefit may have resulted to the one party, nor prejudice to the other, from the surrender and delivery of the document. (l)¹ If one person agrees to transfer, and another person agrees to accept shares in a public company, upon which shares nothing has been paid, and which have no marketable value at the time of the transfer, the agreement constitutes a binding contract. (m)² If the defendant has promised

(l) *Wilkinson v. Oliveira*, 1 Bing. L. J., C. P. 271. *Smith v. Smith*, 13 N. C. 490; 1 Scott, 461. *Haigh v. C. B. N. S.* 429.
Brooks, 10 Ad. & E. 320, 334; 4 P. & (m) *Cheale v. Kenward*, 3 De G. & D. 288. *Thomas v. Thomas*, 2 Gale J. 27; 27 L. J., Ch. 784.
 & Dav. 226. *Westlake v. Adams*, 27

¹ *Hitchcock v. Litchfield*, 1 Root, (Conn.) 206; *Cook v. Bradley*, 7 Conn. 57; *Bailey v. Bussing*, 29 Id. 1; *Merrick v. Trustees, &c.*, 8 Gill. (Md.) 59. An agreement to settle a family controversy is not a nudum pactum. *Watkins v. Watkins*, 27 Ga. 402; *Smith v. Smith*, 36 Id. 184; *Bailey v. Wilson*, 1 Dev. & B. (N. C.) Eq. 182; *Scott v. Warner*, 2 Lans. (N. Y.) 49. What constitutes a good consideration will be, it seems, a question of law. *Applewhite v. Allen*, 8 Humph. (Tenn.) 697; *Tilden v. New York*, 56 Barb. (N. Y.) 340; *Conover v. Stillwell*, 34 N. J. L. 54; *Glasgow v. Hobbs*, 32 Ind. 440; *Worth v. Case*, 42 N. Y. 362.

² *Chapman v. Brooklyn*, 40 N. Y. 372; *Worth v. Case*, 42 Id. 362; *Coleman v. Eyre*, 45 Id. 38.

the plaintiff to pay him a sum of money in consideration of the plaintiff's procuring a tenant for the defendant, or getting him a sale or purchase and conveyance of a particular estate, there is a good and valid consideration for the promise. (*n*)¹

9. *A consideration of loss or inconvenience* sustained by one party at the request of another, is as good a consideration in law for a promise by such other as a consideration of profit or convenience to himself. It is sufficient, if there be any damage or detriment to the plaintiff, though no actual benefit accrue to the party undertaking. (*o*)² If the plaintiff has become security for the promisor, or has accepted bills, or imposed upon himself any legal liability at the request of the latter, there is a sufficient consideration to support a promise and render it binding in law, although no actual benefit or advantage has resulted to the promisor. (*p*) Any trouble or labor too, however slight, undertaken by the plaintiff at the request of the defendant, will support a promise by the latter, and render it binding, although such trouble and labor may have been unsuccessful and productive of no benefit or advantage to the defendant. (*q*) Where the defendant promised a reward to whoever

(*n*) *Seaman v. Price*, 1 Ry. & Mood. 195.

(*o*) *Bunn v. Guy*, 4 East, 194. *Jones v. Ashburnham*, Id. 466.

(*p*) *Bailey v. Croft*, 4 Taunt. 611. *Williamson v. Clements*, 1 Id. 523.

(*q*) *Sturlyn v. Albany*, Cro. Eliz. 67. *March v. Culpepper*, Cro. Car. 70.

¹ *Trask v. Vinson*, 20 Pick. (Mass.) 105.

² *Glasgow v. Hobbs*, 32 Ind. 440; *Sykes v. Lafferry*, 27 Ark. 407; *Carr v. Carr*, 34 Miss. 513; *Stebbins v. Smith*, 4 Pick. 97; *Smith v. Weed*, 20 Wend. 184; *Haigh v. Brooks*, 2 Per. & D. 447; 3 Id. 452; *Farmer v. Stewart*, 2 N. H. 97; *Waterman v. Barrat*, 4 Har. (Del.) 311; *Nicholson v. May*, Wright, 660; *Henman v. Moulton*, 14 Johns. 466; *William v. Alexander*, 4 Ired. Eq. 207; *Whitbeck v. Whitbeck*, 9 Cow. (N. Y.) 266.

would give such information as would lead to the conviction of a felon, and the plaintiff gave the necessary information, it was held that the service rendered was a sufficient consideration for the promise, and that the plaintiff was entitled to recover the reward, although he was a constable and police-officer of the district where the felony was committed. (r)¹ And, where the father of an illegitimate child promised the mother to pay her 2s. 6d. a week if she would abstain from affiliating the child, and the mother did abstain, it was held that the father was bound to make good the weekly payment. (s)²

10. *Works and services rendered to a third party*

(r) *England v. Davidson*, 11 Ad. & L. J., Q. B. 179. S. C. affirmed on E. 856. *Smith v. Moore*, 1 C. B. 438. appeal, L. R., 2 Q. B. 301; 36 L. J., *Thatcher v. England*, 3 C. B. 254. Q. B. 112.
 Lockhart v. Barnard, 14 M. & W. 674; (s) *Linnegar v. Hodd*, 5 C. B. 437; 15 L. J., Exch. 1. *Turner v. Walker*, 17 L. J., C. P. 106. *Crowhurst v. 6 B. & S.* 871; L. R. 1 Q. B. 641; 35 *Laverack*, 8 Exch. 213.

¹ *Prentiss v. Farnham*, 22 Barb. 519; *Jones v. Phoenix Bank*, 4 Seld. (N. Y.) 228; *Brennam v. Hobb*, 1 Hilt. (N. Y.) 151; *Kincaid v. Eaton*, 98 Mass. 139; *Matter of Kelly*, 30 Conn. 159; *Marvin v. Treat*, 37 Id. 96; *First Nat. Bank v. Hart*, 55 Ill. 45; *Day v. Putnam Ins. Co.*, 16 Minn. 408; *Marking v. Needy*, 8 Bush. (Ky.) 22; *Russel v. Stewart*, 44 Vt. 170; *Austin v. Milwaukee Co.* 24 Wis. 278; *Wilson v. McClure*, 50 Ill. 366; *Franklin v. Heeser*, 6 Blackf. 426. And see *Freeman v. Boston*, 5 Metc. (Mass.) 56; *Janorin v. Exeter*, 48 N. H. 83; *Crawshaw v. Roxbury*, 7 Gray, 374; *Crowell v. Hopkinton*, 45 N. H. 9; *Fitch v. Snedaker*, 38 N. Y. 248; *Morse v. Bellows*, 7 N. H. 549; *Wentworth v. Day*, 3 Metc. () 352; *Symones v. Frazier*, 6 Mass. 344. But it seems that it will be essential that the party offering the reward know that it has been sought for, and that this offer was to be acted upon, by the party claiming it, before performance. Story on Contracts, § 493; *Fitch v. Snedaker*, 38 N. Y. 248; nor is the reward offered open unlimitedly, but only for a reasonable time. *Pool v. Boston*, 5 Cush. 219; *Smith v. Whidlin*, 10 Barr. () 39.

² And see *Allen v. Davison*, 16 Ind. 416; 3 P. Maurer v Mitchell, 9 Wates & S. (Pa.) 69.

at the request of the promisor.—Any service, benefit, or advantage rendered to a third person at the request of the promisor is a sufficient consideration for the promise. Thus, if one person should say to another “heal such a poor man of his disease,” or “make an highway,” and I will give thee so much, and he doeth it, an action lieth at the common law. (*t*) A captain of a company of foot soldiers, at the request of the defendant, gave leave of absence to a soldier on the faith of a promise by the defendant that the soldier should return in ten days, or that the defendant would pay the captain £20; and it was held that the leave of absence so given was a sufficient consideration for the defendant’s promise, and that the captain, consequently, was entitled to maintain an action for the breach thereof. (*u*) So, where the defendant promised the plaintiff to pay him £100, if the plaintiff would bail the defendant’s servant, who had been cast into prison, it was held that there was a sufficient consideration for the promise. (*x*) Very slight circumstances also will, in certain cases, suffice to establish a request in point of law. If a tailor furnishes clothes to a boy at school, and the father sees the clothes, on the boy’s return home, and makes no objection to the tailor, this is sufficient to warrant a jury in finding that there was an implied authority from the father to the tailor to furnish the son with clothes. (*y*) Where the father of an illegitimate child promised to pay the mother an allowance of £60 a year during her life, in consideration that she had at his request undertaken, and then had, the care and nurture of the child, and would thenceforth continue to take charge thereof, it was held that there was a sufficient consideration for the

(*t*) 1 Rolle Abr. Action sur Case.(*u*) Taylor v. Jones, 1 Raym. 312.(*x*) Hunt v. Bate, Dyer. 272, a.(*y*) Law v. Wilkin 6 Ad. & E 718.

promise, and that the executors of the father, after his decease, were bound to continue the payment of £60 a year to the mother. And where the promise was to pay the mother £100 a year for life if she would bring up the child properly, and the mother did so, it was held that the annuity could not be withdrawn. (2)¹

II. *Bygone acts or services* will sustain an action when performed or rendered pursuant to the previous request of the promisor.—Thus, where the plaintiff brought his action upon a promise made by the defendant to pay the plaintiff £20, in consideration that the plaintiff, at the instance of the defendant, had taken to wife the cousin of the defendant, it was held that the action was maintainable, although the marriage was executed and past before the undertaking and promise were made, because the marriage ensued at the request of the defendant. (a)² So, where the defendant, having feloniously slain one Patrick Mahume, “required the plaintiff to endeavor to obtain a pardon for him from the king, and the plaintiff journeyed and labored, at his own charges and by every means in his power, to effect the desired object, and the defendant, afterwards, and in consideration of the premises, promised to give the plaintiff £100, it was held that,

(2) *Jennings v. Brown*, 9 M. & W. 496. *Hicks v. Gregory*, 8 C. B. 383; 19 L. J., C. P. 81; 7 C. B. 716. (a) *Dyer*, 272, b. 1 Wms. Saund. 264, 264 a.

And see *Miller v. Drake*, 1 Cai. (N. Y.) 45. A. promised the husband of a favorite niece that he would pay \$5,000 toward the price of a farm, if the husband would buy it, instead of removing to another state, and the husband did buy it and live there. Held, that there was a good consideration for the promise. *Berry v. Graddy*, 1 Metc. (Ky.) 553. So a covenant to keep secret a method of converting cast iron into malleable iron.

¹ *Allen v. Davison*, 6 Ind. 416; *Maurer v. Mitchell*, 9 Wats & S. (Pa.) 69.

although the consideration was passed and gone before the promise was made, yet, inasmuch as the consideration was moved by the previous suit or request of the party," the promise was binding and capable of sustaining an action. (*b*) But the thing done must, of course, have been advantageous to the defendant, or detrimental, or troublesome, or inconvenient to the plaintiff, and must be such an act or service as the law recognizes as a legal consideration for a promise. (*c*)¹

12. *Implied requests.*—If the defendant has accepted and retains the benefit or advantage of the consideration, the law will imply a request, where none exists in point of fact. Thus, if a man pays a sum of money or buys goods for me without my knowledge or request, and afterwards I agree to the payment or receive the goods, this subsequent assent is equivalent to a previous request, in accordance with the ancient maxim of the civil law, *omnis rati habitio retrotrahitur et mandato priori æquiparatur*. (*d*) A request, too, is frequently implied by law for the purpose of enabling a man to enforce an express promise founded upon a meritorious claim not amounting to a strict legal right. If a man, for example, clothes, feeds, and educates an infant during his infancy, and the latter, after he comes of age, makes an express promise to his benefactor to pay him a certain sum of

(*b*) *Lampleigh v. Braithwait*, Hob.
105. *Sidman v. Worthington*, Cro. Eliz.
42. *Harris's Case*, Dyer, 272, a, n.
31.

(*c*) *Kaye v. Dutton*, 13 L. J., C. P.
187; 7 M. & Gr. 816. *Victors v.*
Davies, 12 M. & W. 759.
(*d*) 1 Saund. 264, n. 1.

¹ So public services in the army, during a war, is a good consideration for a grant made by a town of a sum, in addition to the public pay, to soldiers who had enlisted, as well as to those who should enlist. *Hitchcock v. Litchfield*, 1 Root (Conn.) 206.

money in consideration of the benefits so rendered, the law will imply a previous request (*e*) on the part of the infant for the supply of the necessities of life so furnished. Hence it has been said, that the existence of a moral duty or obligation to do a particular thing is a sufficient consideration for an express promise to perform it. But this is not true as a general proposition in point of law.

13. Moral obligations.—The only duties of the nature of mere moral obligations that will support an express promise are those which could be enforced at common law but for the intervention of some positive rule of law or statutory enactment, which, with a view to the general benefit, exempts the party in that particular instance from liability. Such are the duties and obligations arising out of the debts and contracts of persons under age, and antiquated legal claims and demands barred by the statute of limitations, where the remedy is taken away by a positive rule of law, or by express legislative enactment, and the payment of the debt, or the performance of the engagement remains a voluntary duty, binding only in foro conscientiæ. In these instances, and upon such duties and obligations so exempted, an express promise operates to revive the liability and take away the exemption. It revives a precedent good consideration; but it can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statutory provision. (*f*) Thus, a bill of exchange given after the repeal of the usury laws, in renewal of a bill given before such repeal to secure

(*e*) *Cooper v. Martin*, 4 East, 81.

249, n. a. *Eastwood v. Keuon*, 11

(*f*) *Wennall v. Adney*, 3 B. & P. Ad. & E. 447.

the repayment of usurious interest, is valid; (*g*) but past seduction and past cohabitation are not a sufficient consideration to support an express promise to pay an annuity to the injured female. (*h*):

(*g*) *Flight v. Reed*, 1 H. & C. 703; (*h*) *Binnington v. Wallis*, 4 B. & 32 L. J., Exch. 265. Ald. 650.

¹ The rule in the United States seems to be that a moral obligation is not a sufficient consideration to support an express promise, except in those cases where there has been an antecedent good or valuable consideration. *Mills v. Wyman*, 3 Pick. (Mass.) 207; *Updike v. True*, 13 N. J. Eq. 151; *Cook v. Bradley*, 7 Conn. 57; *Loomis v. Newhall*, 15 Pick. (Mass.) 159; *Hawley v. Farrar*, 1 Vt. 420. But see *Musser v. Ferguson*, 55 Pa. St. 475; *Montgomery v. Sampton*, 3 Metc. (Ky.) 519; *Clark v. Herring*, 5 Binn. (Pa.) 33. *Glass v. Beach*, 5 Vt. 173; *Commissioners v. Perry*, 8 Ohio, 58; *Turner v. Patridge*, 3 Pa. 172; *Barlow v. Smith*, 4 Vt. 144. A mere moral consideration will not support a promise; when, however, the precedent original consideration is sufficient to sustain the promise, but the right of action is suspended or barred by some rule of statutory or common law, the debtor may by a subsequent promise waive the exemption. This principle applies only to cases when the original right of action is extinguished by the act of the law, and not to those extinguished by the act of the parties. *Shepard v. Rhodes*, 7 R. I. 470; 1 *Hilliard on Contracts*, 253.

The reason given by Story (*Contracts*, § 590) is that, although the law will not suffer any immorality, it can not undertake to enforce every contract which a man of strict honor and integrity would feel himself bound to fulfill. . . . It is neither within the province nor the policy of the law to apply a metaphysical standard of morality to the conduct of men in their common relations of life. So where a son who was of age was taken sick among strangers, and his father wrote a letter to one who took care of him, promising to pay the expenses of his nursing, it was held to be a nudum pactum, a father not being liable for his son's necessities after he becomes of age. *Mills v. Wyman*, 3 Pick. (Mass.) 207; see also *Cook v. Bradley*, 7 Conn. 57; *Friar v. Hardenbergh*, 5 Johns. (N. Y.) 272; *Story on Contracts*, § 134, 135, 159, 160). A sufficiently general statement of the proposition is that moral obligation is a sufficient consideration for an express promise

14. *Forbearance of legal or equitable rights* forms a good consideration for an undertaking, and will make it binding, (i) and this even though no actual benefit accrue to the party undertaking. If the plaintiff, for example, at the request of the defendant, forbears to institute legal proceedings, or discontinues legal proceedings already commenced, against a third party for the enforcement of a lawful claim or demand for any convenient or reasonable period, or suspends

(i) *Alliance Bank v. Broom*, 2 Drew. well v. Williams, L. R., 2 C. P. & Sm. 289; 34 L. J., Ch. 256. *Brace-* 196.

to where, at some time or other, a good or valuable consideration has existed, whether barred by the statute of limitations, or infancy, or other defenses. *Cook v. Bradley*, 7 Conn. 57; *Parker v. Carter*, 4 Munf. 273; *McPherson v. Rees*, 2 Penn. 521; *Pennington v. Gittings*, 2 Gill. & Johns. 208; *Smith v. Ware*, 13 Johns. (N. Y.) 259; *Edwards v. Davis*, 16 Id. 281, 283, note; *Greeves v. McAllister*, 2 Binn. (Pa.) 591; *Chandler v. Neale*, 2 Hen. & Munf. 124; *Eakin v. Fenton*, 15 Ind. 59; *Aby v. Bennett*, 10 Id. 478; *Spahr v. Hollingshead*, 8 Blackf. 415; *Geer v. Archer*, 2 Barb. 421; *Ehle v. Judson*, 24 Wend. 97; *Bentley v. Morse*, 14 Johns. 268; and see *Nash v. Russel*, 5 Barb. 556; *Mardi v. Tyler*, 5 B. Monr. (Ky.) 382; *Walkins v. Halstead*, 2 Sandf. 311; *Way v. Sherry*, 6 Cush. 238; *Turner v. Chrisnian*, 20 Ohio, 332; *Warren v. Whitney*, 24 Me. 561; *Maxim v. Morse*, 8 Mass. 127; *Scouton v. Eislord*, 7 Johns. 36; *Erwin v. Saunders*, 1 Cow. (N. Y.) 249; *Shippey v. Henderson*, 14 Johns. 178; *Stafford v. Bacon*, 25 Wend. 382; *Goodsell v. Myers*, 3 Wend. 479; *Hoit v. Underhill*, 10 N. H. 436; *Wightman v. Coates*, 15 Mass. 1; *Bobo v. Hansell*, 2 Bailey, 114; *Robbins v. Otis*, 1 Pick. (N. Y.) 370; *Everson v. Carpenter*, 17 Wend. (N. Y.) 419; *Proctor v. Sears*, 4 Allen (Mass.) 95; *Martin v. Mayo*, 10 Mass. 141; and note.

¹ *Jennison v. Stafford*, 1 Cush. 168; *Rood v. Jones*, 1 Doug. (Mich.) 188; *Giles v. Ackles*, 9 Barr. 247; *Silvis v. Ely*, 3 W & S. 420; *Watson v. Randall*, 20 Wend. 201; *Ford v. Rehman*, Wright, 439; *Gilman v. Kibler*, 5 Humph. 19; *Colgin v. Henley*, 6 Leigh. 85; *Martin v. Black's Ex.*, 20 Ala. 309; *McKinley v. Walkins*, 13 Ill. 140; *Russell v. Cook*, 3 Hill. 504; *Seaman v. Seaman*, 12 Wend. 381; *Stewart v. Ahrenfelt*, 4 Den. 189.

or withdraws an execution or a distress against the goods or the person of such third party, the suspension or withdrawal of such execution or distress, or the forbearance of further proceedings, forms a sufficient consideration for a promise by the defendant to pay money to the plaintiff, or to satisfy the full amount of his claim. (*k*) The abandonment and discontinuance of an action, brought to enforce a doubtful right or claim are a sufficient consideration for a promise; (*l*) and so is the compromise of a disputed claim made *bonâ fide*, even although it ultimately appears that the claim was wholly unfounded; (*m*)¹ and if there be an admitted debt due from one person to another, but disputes and doubts exist as to the exact amount due, the compromise and settlement of the disputes, and the abandonment of the claim to its full extent, form a sufficient consideration for a promise to pay a smaller sum than the amount claimed; (*n*)² and, in the case of all unliquidated claims and demands, where the precise amount due has not been fixed and

(*k*) *Smith v. Algar*, 1 B. & Ad. 603. 1 Roll. Abr. 24, pl. 53. *Morton v. Burn*, 7 Ad. & E. 19. *Pilkington v. Green*, 2 B. & P. 151. *Sugars v. Brinkworth*, 4 Campb. 46.

(*l*) *Longridge v. Dorville*, 5 B. & Ald. 117. *Stracey v. Bank of England*, 4 M. & P. 639. *Llewellyn v. Llewellyn*, 15 L. J., Q. B. 4. But not

the abandonment of a suit, when the plaintiff knows and has admitted that he had no cause of action at all. *Wade v. Simeon*, 15 L. J., C. P. 114. *Graham v. Johnson*, Law Rep. 8 Eq. 30.

(*m*) *Callisher v. Bischoffsheim*, L. R., 5 Q. B. 449; 39 L. J., Q. B. 181.

(*n*) *Edwards v. Baugh*, 11 M. & W. 441; 12 L. J., Exch. 427.

¹ A valid consideration may arise from the compromise of doubtful or conflicting claims known to be so. 1 Hilliard on Contracts, 263; *Pilkin v. Noyes*, 48 N. H.; *Fullam v. Adams*, 37 Vt. 391; Am. Law. Reg., Sept. 1869, p. 572. And this, although litigation has not commenced. 1 Hilliard on C., 263; *Zane v. Zane*, 6 Munf. (Va.) 406; *Blacke v. Peek*, 11 Vt. 483; *Truett v. Chaplain*, 4 Hawks, 178; *Thalman v. Barbour*, 5 Ind. 178.

² *Id.*

reduced to a certainty by the agreement of the parties, the payment or satisfaction of part of the demand is a good consideration for the discharge of the residue, (o) although litigation has not been actually commenced. (p)¹ As a husband has the power of immediately enforcing in a joint action a claim of the wife which accrued to her before the marriage, forbearance by him from so doing is a sufficient consideration to support a promise made to him alone. (q)²

15. *Trust and confidence.*—If a man is intrusted with, and receives money or goods on the faith of a promise to deal with them in a particular manner, an action can be maintained against him for any loss or injury that may be sustained by reason of a breach of

(o) *Wilkinson v. Byers*, 1 Ad. & E. 113. *Watters v. Smith*, 2 B. & Ad. 889. (p) *Cook v. Wright*, 1 B. & S. 559; 30 L. J., Q. B. 321. (q) *Rumsey v. George*, 1 M. & S. 180.

¹ Id. But if the claim is absolutely and clearly unsustainable at law or in equity, it is otherwise. *Gould v. Armstrong*, 2 Hull. 266; *New Hampshire Savings Bank v. Concord*, 15 N. H. 119; *Silvernail v. Cole*, 12 Barb. (N. Y.) 685; *Sharpe v. Rodgers*, 12 Minn. 174.

² It is not necessary that the forbearance should extend to an entire discharge; any delay which is real and not merely colorable will be sufficient. 1 Parsons on C. 442. In *Sage v. Wilcox*, 6 Conn. 81, the delay was one year. A general agreement to forbear all suit, will be considered as a perpetual forbearance. *Clark v. Russel*, 3 Watts, 213; *Sidwell v. Evans*, 1 Pa. St. 385. It is not necessary that the party who makes the promise, in consideration of the promise, shall have a direct interest in the suit forborne. 1 Parsons on C. 443. "But there must have been some party who could have been sued; and, in cases in which the person to be forborne is not mentioned, but the forbearance may be understood to be forbearance of whoever might be sued; the promise founded on such consideration is binding, if there be any person liable to suit, though the defendant himself is not liable." Id. "Where A. gave B. a receipt for \$100," on account of carpenter's work done for him, the balance to be paid as soon as the amount is

the promise, although the duty or trust may have been undertaken gratuitously.¹

16. *Inadequacy of consideration.*—From the preceding remarks, it will be perceived that the consideration for a simple contract or promise need not be adequate in point of value. "If there be any consideration, the court will not weigh the extent of it." (r) It has no means of scrutinizing the varied hidden motives and reasons that may have influenced the parties, and induced them to enter into the contract, nor can it determine upon the prudence or propriety of the transaction. If parties choose to enter into unwise and improvident bargains, they must abide by the consequences of their own rashness and folly;

(r) *Ellenborough, C. J., 16 East, 2 H. Bl. 312. Pinnell's Case, 5 Co 372. Hitchcock v. Coker, 6 Ad. & E. 117, a 117 b 457. Starlyn v. Albany, Cro. Eliz. 67.*

ascertained, by agreement of ourselves, or by valuation. Held, that this was not a valid agreement to forbear suit, being without consideration. *Reynolds v. Lofland, 3 Hav. (Del.) 366* Future forbearance by the depositors of a banker can form no consideration for an absolute agreement by guarantors to pay the depositors, made without reference to such forbearance. *Steadman v. Guthrie, 4 Metc. (Ky.) 174.*

A creditor's agreement to forbear seizing property on attachment against his debtor, will not support a promise by a third person to pay the debt, if, at the time, the debtor has no interest in the property. *Rood v. Jones, 1 Dougl. (Mich.) 188.* A suit can not be maintained for a violation of a voluntary promise to continue a cause in court, and for taking judgment and execution contrary to such promise, unless it is stated and proved that there was a defense. *Hunt v. Johnson, 23 Mo. 432.* See further *Lumberman's Bank v. Smith, 4 Pa. St. 504; Farmers' Bank v. Blair, 44 Barb. 641; Hill v. Buckminster, 5 Pick. (Mass.) 393,* where the forbearance consisted in withdrawing objections to the probate of a will. *Mallory v. Gilett, 7 E. D. Smith, 412; Flemming v. Ramsey 46 Pa. 252.*

¹ *Parsons on Cont. 1, 477.*

they have contracted for themselves, and the court can not contract for them. (s)¹

17. *The promise.—Unilateral promises.*—There is a large class of contracts in which there is no mutuality of engagement or liability. In the preceding cases, for example, where the consideration for the promise made by the defendant was the giving up or surrender of letters or securities, or the performance of work and labor, or the marrying the defendant's kinswoman, or the suspension or forbearance of legal proceedings, or the entrusting another with property, the plaintiff

(s) But the consideration must be of some value. *Smith v. Smith*, 3 Leon. 614. *Cheale v. Kenward*, 3 De G. & 83. 1 Rol. Abr. 23. See, as to the rule in equity, *Townend v. Toket*, L. R., 1 Ch. 446, 458; 35 L. J., Ch. 608, 614.

¹ *Shepard v. Rhodes*, 7 R. I. 470. A slight consideration may sustain a heavy obligation. *Hilliard on Cont.* 250; *Johrson v. Tiltles*, 2 Hill (N. Y.) 606; *Oakley v. Boorman*, 21 Wena. (N. Y.) 588; *Thomas v. Quintard*, 5 Duer (N. Y.) 80. But the rule, it seems, will not be enforced to the extent of working manifest hardship. Thus a contract solely for the exchange of unequal sums of money, the value of which is exactly fixed, as to pay \$100, in consideration of \$1 (*Shepard v. Rhodes*, 7 R. I. 470); or a promise to pay \$600, upon a consideration of one cent (*Schnell v. Nell*, 17 Ind. 29); or where the thing constituting the contract is entirely useless (*Rowe v. Blanchard*, 18 Wis. 441; *Clough v. Patrick*, 37 Vt. 421; *Whittle v. Skinner*, 23 Id. 532; *Sanborn v. French*, 2 Fost. (N. H.) 296; *Harlan v. Harlan*, 20 Pa. St. 303; *Johnson v. Dorsery*, 7 Gill. 269; *Wormack v. Rodgers*, 9 Geo. 60; *Judge v. Wilkens*, 19 Ala. 765; *Milnes v. Cowley*, 8 Price, 620; *Mayor v. Williams*, 6 Md. 235; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 23; *Baxter v. Wales*, 12 Mass. 365; *Cabot v. Haskins*, 3 Pick. (Mass.) 83; *Callaghan v. Hallet*, 1 Cai. (N. Y.) 104; *Sweeney v. Hunter*, *Murphey*, 181; *Smith v. Bartholomew*, 1 Metc. 276; *L'Amoureux v. Gould*, 3 Seld. (N. Y.) 349; *Warden v. Tucker*, 7 Mass. 449. *Freeman v. Boynton*, Id. 453; *May v. Coffin*, 7 Ill. 347; *Ross' Ex. v. McLauchlan's Adm.*, 7 Gratt. 86; *Silvernail v. Coie*, 12 Barb. 685; 1 *Parsons on Cont.* 436.

was not, by the terms of the original contract, bound to give up the letters, or perform the work, or marry the kinswoman, or suspend the legal proceedings, or entrust the party with property; but, when, acting upon faith of the promise made to him, he did so, the promise attached to the consideration so performed and accomplished, and the defendant was liable upon his promise. When the defendant has had the benefit of the consideration for which he bargained, it is no answer to an action brought against him to say that the plaintiff was not bound by the contract to do the act. (t)¹ Thus, in the case of guarantees:—"Suppose I say, if you will furnish goods to a third person, I will guarantee the payment; there, you are not bound to furnish them; yet, if you do furnish them in pursuance of the contract, you may sue me upon my guarantee." (u) So, if a person says, "In case you choose to employ this man as your agent for a week, I will be responsible for all such sums as he shall receive during that time, and neglect to pay over to you," the party indemnified is not therefore bound to employ the person designated by the guarantee; but, if he does employ him, then the guarantee attaches and becomes binding on the party who gave it. (x)² It does not follow that, because a householder applies to a gas company for a supply of gas, and is promised a supply, and fits up his premises with stoves and fittings for the purpose of having them warmed and

(t) *Tindal C. J.*, 6 Sc. N. R. 106.
Jones v. Robinson, 17 L. J., Exch. 36.
Mills v. Blackhall, 11 Q. B. 358; 17
 L. J., Q. B. 31; 12 Jur. 93.

(u) *Morton v. Burn*, 7 Ad. & E. 23.
 (x) *Kennaway v. Treleavan*, 5 M.
 & W. 501. *Offord v. Davies*, 12 C.
 B. N. S. 748; 31 L. J., C. P. 319.

¹ Such are standing promises or offers to promise which become contracts, when accepted. Story on Contracts, § 572

² See Morgan's *De Colyar on Guaranty*, 237-242.

lighted with gas, there is any contract on the part of the company to supply, or on the part of the householder to consume and pay for gas, any longer than either of them may think fit. The householder is not bound to take gas, nor the company to supply it, for a single minute longer than each is minded so to do. (y) So an advertisement of a sale by auction does not amount to a contract, with any one who may act upon it, that all the things advertised will actually be put up for auction, and that such person will have an opportunity of bidding for them. It is a mere declaration of intention, and not an offer; and persons who attend the sale can not maintain an action against the auctioneer, if the articles advertised are not put up for sale. (z)

18. *Mutual promises*.—There is a large class of contracts, also, which, being founded upon mutual promises, are perfected and made binding by the bare consent of the parties, promise or undertaking of the one party to do one thing being the consideration for the promise of the other to do another. To these contracts, framed and constituted for the performance of mutual and reciprocal acts and duties, and founded upon a mutuality and reciprocity of obligation and liability, the objection of nudum pactum can not apply. Such are all contracts of sale, where the promise or undertaking of the one party to sell, forms the consideration for the promise of the other to buy, and where the "bargain is struck," and the contract concluded, by the mere assent of the parties. (a) Such, also, are all agreements by simple contract between creditors for compounding their debts and releasing

(y) *Haddesdon Gas Co. v. Hazelwood*, 6 C. B. N. S. 249; 28 L. J., C. P. 268.

(z) *Harris v. Nickerson*, L. R., 8 Q. B. 286.

(a) 2 Bl. Com. 447. *Noy's Maxims* c. 42; Just. Inst. lib. .ii. tit. 23.

their debtor from their several claims, on receiving a part only of the amount due to them; the agreement by one to compound his debt and release the debtor being the consideration for the agreement of the other to do the same; (*b*) also all contracts of marriage, where the promise of the one party to marry is the consideration for the promise of the other party; also all contracts or agreements to enter into partnership, or to make exchanges of lands and chattels, or to refer disputes to arbitration; (*c*) and whenever several parties simultaneously agree for the performance of several duties or services to or for the benefit of each other, there is a binding contract, and an action will lie. (*d*) All contracts founded upon mutual promises between persons of full age, must be obligatory upon both parties, (*e*) so that each may have an action upon it, or neither will be bound; if the one only is bound, there is no consideration for the promise of the other, and such promise is consequently a nudum pactum. A written agreement, therefore, to submit disputes and differences to arbitration, must be signed by all parties before any one can be made liable upon it, as the obligation by all to obey the award of the arbitrator is the consideration of each for his entering into the contract; and, before a plaintiff can succeed in an action upon such a contract, he must show that he had himself engaged to be bound by the award. (*f*) The

(*b*) *Boothbey v. Sowden*, 3 Campb. 175. *Wood v. Roberts*, 2 Stark. 417.

(*c*) *Gower v. Capper*, Cro. Eliz. 543; Id. 703, 888. *Mansfield v. Stephen*, Comb. 256. *Hebden v. Rutter*, 1 Sid. 180. *Holder v. Dikson*, 1 Freem. 95. *Gibbons v. Prewd*, 1 Hardr. 102.

(*d*) *Tipper v. Bicknell*, 4 Sc. 462; 3 Bing. N. C. 710.

(*e*) *Nichols v. Raynbred*, Holb. 98. *Sutcliffe v. Brooks*, 14 M. & W. 355.

(*f*) *Kingston v. Phelps*, Peake, R. 299. *Biddle v. Dowse*, 6 B. & C. 255. An action will lie on a judge's order to refer made by consent, the consent being evidence of an agreement to perform the award. *Livesby v. Gilmore*, L. R., 1 C. P. 570; 35 L. J., C. P. 351.

mutuality of obligation is the very essence of all contracts founded upon mutual promises. "Hence it follows," observes Pothier, "that nothing can be more contradictory to such an obligation than an entire liberty, in either of the parties making the promise to perform it or not, as he may please. An agreement giving such a liberty would be absolutely void for want of obligation," (*g*) *i. e.*, so long as the contract remained wholly executory, and nothing had been done under it. But if the contract has been partly executed by the performance of the act forming the consideration for the promise, then it is no answer to an action to say that the plaintiff was not, by the terms of the original contract, bound to do the act and that there was consequently no mutuality of obligation. (*h*)¹

19. *Contracts with infants.*—It is a principle of the common law that, if a contract has been entered into between an infant and a person of full age, the former may take advantage of his minority, and resist the completion of his contract; but that right can not be urged by the other to show that, as there was not a mutual obligation, there was no consideration for his promise. (*i*) If, therefore, a person of full age enters

(*g*) *Holt v. Ward* Clarencieux, 2 Str. 938. Pothier, Obligations, part 1, art. 4. The same rule prevails in the civil and French laws.

(*h*) *Traité des Obligations*, part 1, ch. 1, art. 3, § 7.

(*i*) *Fishmong. Co. v. Robertson*, 6 Sc. N. R. 56; 5 M. & Gr. 192. *Arnold v. Mayor of Poole*, 5 Sc. N. R. 776; 4 M. & G. 896. *Liv. Boro. Bank v. Eccles*, 4 H. & N. 139; 28 L. J., Exch. 122.

¹ Mutual promises will support each other, unless one of them be void in law (*Babcock v. Wilson*, 17 Me. 372); if voidable only, the contract will not thereby fail. *Parish v. Stone*, 14 Pick. 198. But the promises must be made simultaneously. *Livingston v. Rogers*, 1 Cai. (N. Y.) 585; *Tucker v. Woods*, 12 Johns. 465; *Keep v. Goodrich*, Id. 397; *Leslin v. Jewett*, 12 Barb. 502; *McKinley v. Watkins*, 13 Ill. 140; *Dorsey v*

into a contract of marriage with a lady who is a minor; the latter may sue the former upon the contract, although she is not herself liable to an action for a breach of promise.¹

20. *Assent of the parties.*—If the terms of a contract founded upon mutual promises, have not been

Packwood, 12 How. 126; *L'Amoureux v. Gould*, 3 Seld. (N. Y.) 349; *Wilbur v. Crane*, 13 Pick. (U. S.) 284; *Commercial Bank v. Nowlan*, 7 How. (Miss.) 508; *Quarles v. George*, 23 Pick. 401; *Myers v. Morse*, 15 Johns. 425; *Babcock v. Wilson*, 17 Me. 372; *Have v. O'Malley*, 1 Murph. 287; *Coleman v. Eyre*, 45 N. Y. 88.

So reciprocal promises to marry are binding. So an infant's promise to marry is sufficient consideration for a corresponding promise (*Willard v. Stone*, 7 Cow. 22; *Miller v. Goodwin*, 8 Gray, 542; *Wightman v. Coates*, 15 Mass. 1; *Boynton v. Kellogg*, 3 Id. 189; *Holcroft v. Dickenson*, Carter, 233; *Dygart v. Remerschnider*, 32 N. Y. 629); or a promise to pay for goods for a promise to deliver them. *Appleton v. Chase*, 19 Me. 74; *Briggs v. Tillotson*, 8 Johns. 304; *White v. Demilt*, 2 Hall. 405. A promise by a woman to marry a man and pay his debts, in consideration that he convey her his property, is valid and binding on the husband, if fully performed by the wife (*Dygart v. Remerschnider*, 32 N. Y. 629); or to marry a man for a note given by him—and the subsequent marriage does not annul the note. *Wright v. Wright*, 59 Barb. 506.

Promises for an exchange of work are valid (*Davis v. Petet*, 27 Vt. 216); so too all mutual compromises. *Union Bank v. Geary*, 5 Pet. 114; *Barlow v. Ocean Ins. Co.* 4 Metc. (Mass.) 270; *McKinley v. Watkins*, 13 Ill. 140; *Gould v. Armstrong*, 2 Hall. 266; *Storrs v. Barker*, 1 Johns. Ch. (N. Y.) 516; *Lyon v. Richmond*, 2 Id. 51; *Hunt v. Rousmaniere's Ex.*, 1 Pet. 15; *S. C. 8. Wheat*, 179. So where persons mutually subscribe to contribute certain sums of money to a common object, the promise of all is a sufficient consideration for the promise of each. *Society in Iron v. Perry*, 6 N. H. 164; *George v. Harris*, 4 Id. 533; *Commissioners v. Perry*, 5 Ohio, 58; *State Treasurer v. Cross*, 9 Vt. 289; *Watkins v. Eames*, 9 Cush. 537; *Mirick v. French*, 2 Gray, (Mass.) 420; *Bryant v. Goodnow*, 5 Pick. (Mass.) 229; *Farmington Acad. v. Allen*, 14 Mass. 172; *Holmes v. Dana*, 12 Id. 190; *Williams College v. Danforth*, 12 Pick. 541.

¹ See, however, *Story on Cont.* § 124.

finally agreed upon, if either party withholds, or has not given, his full assent to them, the contract is incomplete; it binds neither of the parties, and can give rise to no cause of action. (*k*)¹ Where a proposal or tender is accepted, subject to the terms of a contract being arranged and drawn up for signature, there is no concluded bargain, until the terms have been arranged, and a written contract executed. (*l*)² A proposed contract is not binding on the party who proposes it, until the acceptance of the other party has been communicated to him or his agent. Thus, if a man applies for shares in a company, and the directors allot them to him, and, after the allotment, but before it is communicated to the applicant, he withdraws his application, there is no complete contract, and he is not bound to accept them. (*m*) So, too, a promise of

(*k*) *Routledge v. Grant*, 1 Moo. & P. 717; *Bing*, 653. *Cope v. Albinson*, 8 Exch 185. *Felthouse v. Bindley*, 11 C. B. N. S. 869; 31 L. J. C. P. 204.

(*l*) *Kingston-upon-Hull v. Petch*, 10 Exch. 610; 24 L. J. Exch. 23. *Honeyman v. Marryat*, 26 L. J. Ch.

619. And see *Heyworth v. Knight*, 17 C. B. N. S. 298; 33 L. J. C. P. 298.

(*m*) *Hebbs' Case*, L. R., 4 Eq. 9; 36 L. J. Ch. 748. *Gunn's Case*, L. R., 3 Ch. 40; 37 L. J. Ch. 40; *Graham ex parte* 30 L. J. Bk. 42, Ch. 861. *Pellatt's Case*, L. R., 2 Ch. 527; 36 L. J. Ch. 613.

¹ The minds of the parties must assent to the same thing in the same sense. *Hartford &c., R. R. Co. v. Jackson*, 24 Conn. 514. There must be a reciprocal assent to certain and definite propositions. So long as any essential matters are left open for further consideration, the contract is not complete. *Brown v. N. Y. Central R. R. Co.*, 44 N. Y. 79; *Lyman v. Robinson*, 14 Allen (Mass.) 254; *Smith v. Dutchard*, 45 N. Y. 597.

² There must be a definite acceptance of the proposition. *Tucker v. Woods*, 12 Johns 190; *Rowell v. Montvill*, 4 Greenl. 270; *Eskridge v. Glover*, 5 Stew. & Port. 264; *Bornstein v. Lans*, 104 Mass. 216; *Train v. Gold*, 5 Pick. 380, 384; *Goward v. Waters*, 98 Mass. 596; *Bull v. Newton*, 7 Cush. (Mass.) 599; *Real Estate &c. Ins. Co. v. Roessle*, 1 Gray, 336; *Chicago &c. R. R. Co. v. Dane*, 43 N. Y. 240.

marriage, so long as it remains unaccepted, amounts to a mere proposal or offer, which may be retracted at any time. Before, therefore, the plaintiff can succeed in an action upon such a promise, it must be shown that he or she accepted the proposal, and so entered into a corresponding engagement; and this acceptance may be proved and established by the conduct of the party, as well as by express words.¹ If an offer has been made by one man to sell goods to another, such offer is not, of course, binding until it has been accepted by the party to whom it has been made, as the one can not be held liable to the other for not selling the goods, unless that other, by accepting the offer, has bound himself to purchase.² Where the defendant proposed to sell goods to the plaintiff at a fixed price, and gave him, at his request, a certain time to determine whether he would buy them or not, and the plaintiff, within the time, determined to buy them, and gave notice thereof to the defendant, and offered to pay the price, but the latter then receded from his offer, and refused to deliver the goods and accept the money: it was held, in an action for the non-delivery of the goods, that there was no complete contract of sale; that, as the plaintiff was not by the original contract bound to purchase, there was no con-

¹ "It does not matter by what mode assent is expressed, provided it be intelligible. Thus it may be given by a nod, by shaking hands, taking off a shoe, or drawing a shilling across the hand, all of which are signs of ratification among different nations." Story on Cont. § 490; 2 Black. Com. 448; Toullier des Contracts, § 33; 2 Heinecc. de Jure Ant. Germ. § 335; Ruth. Inst. ch. 4, p. 8, 9; Bracton, L. 2, c. 27; Inst. L. 3, tit. 23.

² So a contract between deaf and dumb persons may be completed by any signs which are reciprocally intelligible. Story on Cont. § 490.

sideration to bind the defendant to sell; and that the engagement was all on one side, and was therefore a nudum pactum. (n) And, where there was a proposal by the defendant to take a lease from the plaintiff on certain terms, and to this proposal the plaintiff was to give a definite answer within six weeks, it was held that, if six weeks are given by one party to accept an offer, the other has the same period to put an end to it.¹ The contract must be mutual; and the one party can not be bound without the other. (o) If, however, anything has been given or done as the consideration for the promise—if, for instance, the party to whom it is made has agreed to incur any expense or labor in consideration of the offer being continued or kept open for a certain time—then the party making the offer is not at liberty to retract it. When the promise has been accepted and the contract concluded, the acceptance cannot be revoked; and neither party is at liberty, without the consent of the other, to rescind the contract, or “be off” from his bargain. (p) But, if the party to whom the offer is made does not accept it in the very terms in which it is made, and some new qualification or condition is annexed to

(n) *Cooke v. Oxley*, 3 T. R. 653.

(p) *Grant v. Hunt*, 1 C. B. 44.

(o) *Best, C. J., Routledge v. Grant*, *Baines v. Woodfall*, 6 C. B. N. S. 1 Moo. & P. 731.

676; 28 L. J., C. P. 338.

¹ Where verbal proposition is made, without any agreement or understanding as to time, it should be accepted on the spot, or ordinarily the proposer will not be bound (*Johnson v. Fessler*, 2 Watts, 48). However, if the custom of the trade to which the parties belong is to allow a reasonable time (*Peru v. Turner*, 1 Fairf. 185); or the circumstances are peculiar (*Id.*; *Mactier v. Frith*, 6 Wend. 103; *Beckwith v. Cheever*, 1 Fost. 41); such custom and circumstances might affect the ordinary rule. *Eskridge v. Glover*, 5 Stew. & Port. 264; 20 Am. Jur. 15-32; *Boston, &c. R. R. Co. v. Bartlett*, 3 Cush. 225; *Corning v. Colt*, 5 Wend. 253.

the acceptance, the party making the offer is, of course, not bound by the acceptance. (*q*)¹ And the acceptance must, in all cases, be made and notified within a reasonable time. (*r*)

The assent must not be influenced by any power which one party may have of operating on the fears of the other; and, where fear of exposure is the main and influencing reason for entering into an agreement, it may be set aside. (*s*)

21. Biddings at an auction are mere offers, which may be retracted at any time before the hammer is down, and the offer has been accepted. Where the defendant had retracted his bidding at an auction, the court said, "The assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done till the defendant had retracted. An auction is not unaptly called *locus pœnitentiæ*. Every bidding is nothing more than an offer on the one side, which is not binding on the other side till it is assented to." (*t*)²

(*q*) *Duke v. Andrews*, 2 Exch. 290; 17 L. J., Exch. 231. *Gilkes v. Leonino*, 4 C. B. N. S. 501. *Jordon v. Norton*, 4 M. & W. 161. *Addinell's Case*, L. R., 1 Eq. 225; 35 L. J., Ch. 75.

(*r*) *Ramsgate Victoria Hotel Company v. Goldsmid*, L. R., 1 Ex. 109.

(*s*) *Bayley v. Williams*, 4 Giff. 638.

(*t*) *Payne v. Cave*, 3 T. R. 148. *Warlow v. Harrison*, 28 L. J., Q. B. 18.

¹ If one party attach to the proposition of the other a signification not authorized by reasonable inference or fair understanding, the injury resulting from the misunderstanding must fall on him. *Thompson v. Ray*, 46 Ala. 224.

² A blow of an auctioneer's hammer will complete a contract, unless the offer is retracted before the hammer falls. See *Gill v. Hewett*, 7 Bush. (Ky.) 10; *Harvey v. Stevens*, 43 Vt. 653; *Gowen v. Klous*, 101 Mass. 449; *Flanigan v. Crull*, 53 Ill. 352; *Thompson v. Kelly*, 101 Mass. 291; *Nat. Bank of the Metropolis v. Sprague*, 20 N. J. Eq. 159; *Price v. Durin* 56 Barb. (N. Y.) 647; *Tully v. David*, 45 Mo. 444; *Kerr v*

22. *Acceptance of offers made by post.*—Where the defendants wrote to the plaintiffs, making them an offer of merchandise at a fixed price, they “receiving an answer in course of post,” it was held that there was a binding contract of sale the moment the letter accepting the offer was posted, and that the defendants were not at liberty to retract their offer before the arrival of the time for receiving the answer; otherwise, it was observed, no contract could ever be completed by p. st. In this case the defendants misdirected a letter, and so caused a delay in its receipt, and in the return of the answer, and, not having received the answer at the expected time, they sold their merchandise to another person; and it was held that, as the delay had been occasioned by their own neglect, and not by any omission or default on the part of the plaintiff, the answer must be taken to have come back in due course of post, and that the defendants were liable upon the contract for the damage sustained by the plaintiff by reason of his loss of the bargain, and of the non-delivery of the goods. (u) If the letter in acceptance of the offer miscarries, and never reaches its destination, the contract is nevertheless complete, (x) unless the miscarriage is

(u) *Adams v. Lindsell*, 1 B. & Ald. 681. this point in *American Telegraph Company v. Colson*, L. R. 6 Ex. 108; 40 L. J., Ex. 97. See also

(x) *Dunlop v. Higgins*, 1 H. L. C. 381. *Duncan v. Topham*, 8 C. B. 225. *Potter v. Sanders*, 6 Hare, 1. Some doubt has lately been thrown on *Reidpath's Case*, L. R. 11 Eq. 86; and *Townsend's Case*, L. R. 13 Eq. 148. *American Telegraph Co. v. Colson*

City, 1 Pa. Leg. Gaz. Rep. 254; *Walker v. Herring*, 2 Gratt. (Va.) 678; *Johnson v. Buck*, 35 N. J. L. 338; *Schell v. Stephens*, 50 Mo. 375; *Russel v. Miner*, 5 Lans. (N. Y.) 337; 61 Barb. 534; *Phillips v. Higgins*, 7 Lans. (N. Y.) 344; *Lara v. Nast*, 24 La. An. 310; *Succession of Navarro*, Id. 105; *Girardey v. Stone*, 24 Id. 286; *Like v. McKinstry*, 3 Abb. (N. Y.) App. Dec. 62.

owing to the fault of the sender. But a man is not bound by communicating his acceptance to his own agent only; in order that the contract may be complete, and the acceptance irrevocable, there must be a communication of the acceptance to the proposer or his agent. (*y*)¹ Where an order is sent by telegram,

has, however, been disapproved of in *Harris's Case*, L. R. 7 Ch. 587; 41 L. J. Ch. 621; and *Walls' Case*, L. R. 15 Eq. 18. Perhaps the true rule is that, if the person making the offer has expressly or impliedly authorized the receiver of the offer to send an answer by post, the person making the offer is bound when the letter containing the acceptance is posted,

on the ground that he has constituted the post-office his agent to receive the acceptance; but that, when no such authority is expressed or can be implied, the person making the offer is only bound when the acceptance actually reaches him.

(*y*) *Hebb's Case*, L. R. 4 Eq. 9; 36 L. J. Ch. 748. *Gunn's Case*, L. R. 3 Ch. 40; 37 L. J. Ch. 40.

¹ When the proposition is sent in a letter by post, the rule appears to be that the person making it can retract by a subsequent letter reaching the other party at any time before an answer of acceptance is written and put in the mail. But as soon as an answer of acceptance by the other party is put in the mail the contract is completely closed as to both parties, even though a letter containing a retraction of the offer is actually on the way (*Story on Cont.* § 498); and this although the letters are written by agents of the principals bound (*Id.*). The retraction of the contract, however, takes effect when it is received (*Id.*), not the acceptance when it is sent. *Hamilton v. Lycoming Ins. Co.*, 5 Barr. 339; *Levy v. Cohen*, 4 Ga. 1; *Potter v. Sanders*, 6 Hare, 1; *Taylor v. Merchants' Ins. Co.*, 9 How. 390; *Vassar v. Camp*, 14 Barb. (N. Y.) 341; 1 Kern (N. Y.) 441; *Beckwith v. Cheever*, 1 Fost. 41; *Averill v. Hedge*, 12 Conn. 436; *Kentucky Ins. Co. v. Jenks*, 5 Ind. 96; *Halleck v. Commercial Ins. Co.*, 2 Dutch. 280; *Gillespie v. Edmonston*, 11 Humphr. 553; *Langstrass v. German Ins. Co.*, 48 Me. 201; *McCulloch v. Eagle Ins. Co.*, 1 Pick. (Mass.) 278; and see *Thomas v. Deering*; *Keen*, 729; *Cummings v. Antes*, 19 Pa. St. 287; *Vandervoort v. Columbians Ins. Co.*, 2 Cal. (N. Y.) 161; *Mumford v. McPherson*, 1 Johns. 414; *Daniel v. Mitchell*, 1 Story, 172; *Doggett v. Emerson*, 3 Id. 400; *Slaymaker v. Irwin*, 4 Whart. 369; *Barker v. Allan*, 5 H. & N. 171; *Bruce v. Pearson*, 3 Johns (N. Y.) 534; *Tuttle v. Love*, 7 Id. 470; *Putnam v. Tillotson*, 13 Metc. (Mass.) 517; *Chicago, &c. R. R. Co. v. Dane*, 43 N. Y. 240.

the telegraph company is only the agent to transmit the message in the terms in which it is delivered to

The post office is a department of the general government, created by statute, and its officers are paid by the government, and can not be understood as entering into any contract with the community or with individuals. The postmaster-general is therefore responsible only to the government, of which he is an agent, and all contracts made by him are made by and binding upon the government, and not by or upon himself personally (*Rowning v. Goodchild*, 3 Wills. 443; *Whitfield v. Le Despencer*. Cowp. 754; *Story on Cont.* § 979; on Agency, §§ 302-307; on Bailments, §§ 462, 463, 464; 1 Bell. Comm. § 468; *Dunlop v. Munroe*, 7 Cranch, 242; *Bolan v. Williamson*, 2 Bay, 551; *Schroyer v. Lynch*, 8 Watts, 632). But while the postmaster-general is not responsible either for his own default or for the default of his deputies (*Story on Cont.* § 979; *Wiggins v. Hathaway*, 6 Barb. (N. Y.) 632), yet his deputies have been held liable for want of diligence, or for fraud of their subordinates, when they themselves have not exercised a reasonable caution and discretion in their selection (*Maxwell v. McIlroy*, 2 Bibb, 211; *Bishop v. Williamson*, 2 Fairf. 495; *Dunlop v. Monroe*, 7 Cranch, 242; *Bolan v. Williamson*, 2 Bay, 551; *Dox v. Postmaster*, 1 Pet. 318; *Christy v. Smith*, 23 Vt. (8 Wast.) 663; *Teall v. Felton*, 3 Barb. (N. Y.) 512; 1 Comst. (N. Y.) 537. *Coleman v. Frazier*, 4 Rich. 146; *Fitzgerald v. Burril*, 106 Mass. 446). Generally mail contractors will be held to make no personal contracts with the senders of letters, and to be responsible only to the government from which they receive their remuneration (*Conwell v. Voorhies*, 13 Ohio, 523; *Hutchins v. Brackett*, 2 Fost. (11) 252). But the contrary was held in *Sawyer v. Coral*, 17 Gratt. 230; and a common carrier can not on the ground of its employment by government set up that it is an agent of the government, so as to escape liabilities for the negligence of its own servants (*Truex v. Erie Ry. Co.*, 4 Lans. (N. Y.) 198). No law of the United States, in reference to the postal service, makes it a legal channel of communication, which a party may adopt as compulsory upon his correspondent (*Tanner v. Hughes*, 53 Pa. St. 289). When a letter is placed in a post-office, it is within the legal custody of the officers of the government, and no one has the authority to open it, even though it comes from a criminal and is suspected of containing improper information. *U. S. v. Eddy*, 1 Bess. 527; *U. S. v. Pond*, 2 Curtis, C. C. 265.

them, and the sender is not responsible for the mistake of the telegraph clerk. (2)'

(2) *Henkel v. Pope*, L. R. 6 Ex. 7; 40 L. J., Ex. 15.

It is the duty of postmasters to deliver to the persons to whom they are addressed letters deposited in the office for persons residing in the same place. *Nevins v. Bank*, 10 Mich. 547.

The postmaster is the only judge of the fact as to which paper has the largest circulation, under the act of congress of March 3, 1845; obliging him to advertise a list of letters non-called for in such a paper, and he is not responsible in a state court for the results of his judgment (*Foster v. McKibben*, 4 Pa. L. J. Rep. 303; 14 Pa. St. (2 Harris.) 168). Nor will an action lie against a postmaster by publishers for refusing their proofs as to the circulation of their newspaper. *Strong v. Campbell*, 11 Barb. (N. Y.) 135. And see besides generally as to post-offices and postmasters, *U. S. v. Bank of Necropolis*, 15 Pet. 378; *Postmaster-General v. Rice*, Gilpin, 544; *U. S. v. Hart*, Pet. C. C. 390; *Trafton v. U. S.*, 3 Story, 646; *Boody v. U. S.*, 1 W & M. 150; *U. S. v. Davis*, Deady, 294; *Foster v. McKibben*, 4 Pa. L. J. Rep. 303; *Fitzgerald v. Burrill*, 106 Mass. 46; *U. S. v. Driscoll*, 1 Low. 303; *U. S. v. Crow*, 1 Bond. 51; *Farnam v. U. S.*, 1 Col. T. 309; *Chouteau v. Steamboat St. Anthony*, 1 Miss. 226; *U. S. v. Hedges*, 13 How. (U. S.) 478; *Ware v. U. S.*, 4 Wal. (Id.) 617; *Trafton v. U. S.* 3 Story, 646; *U. S. v. Brown*, 9 How. (U. S.) 487; *Id. v. Roberts*, Id. 501; *Id. v. Rice*, 9 Gilpin, 554; *Id. v. Foye*, 1 Curtis, C. C. 364; *Id. v. Fisher*, 5 McLean, 23; *Id. v. Kean*, 5 Id. 509; *Id. v. Tanner*, 6 Id. 128; *Id. v. Whitaker*, Id. 343; *Id. v. Emerson*, Id. 406; *Id. v. Sander*, Id. 598; *Id. v. Beaty*, 1 Hemp (U. S.) 487; *Id. v. Parsons*, 2 Blatchf. 104; *Id. v. Marselis*, Id. 108; *Id. v. Collingham*, Id. 470; *Id. v. Mulvaney*, 4 Parker (N. Y.) 164; *Id. v. Collins*, 4 Blatchf. 142; *Id. v. Kirby*, 7 Wall. (U. S.) 482; *Tanner v. Hughes*, 53 Pa. St. 289; *Sawyer v. Corse* 17 Gratt. (Va.) 230; *Wingate v. McNamar*, 28 Ind. 481. As to what is mailable matter, see *U. S. v. Bromley*, 12 How. (U. S.) 88; *Teal v. Felton*, Id. 284.

'Beside the English cases referred to in the text, as to contracts by telegraph, see also *Godwin v. Francis*, L. R. 5 C. P. 295; *McBlain v. Cross*, 25 L. T. (N. S.) 804; *Coupland v. Arrowsmith*, 18 L. T. N. S. 755; *Verdin v. Robertson*, 10 Ct. of Lees Cas. (Scotch) 3d Ser. 35. The contract is complete when the acceptance or telegram is forwarded (*Trevor v. Wood*, 36 N

23. *Contracts by deed* are contracts in writing sealed and delivered by the parties to them. No cause, motive, or consideration (except in the case of certain deeds framed to pass estates in land under the statutes of uses), beyond the mere will of the party making the contract, is necessary to give them validity; and no one can be permitted (except on the ground of fraud or deceit) to aver or to prove anything in contradiction to what he has solemnly and deliberately avowed by deed. (a) But, although a deed recites that money has been paid to a party, and

(a) *Sharrington v. Strotton*, Plowd. *v. Taylor*, 7 T. R. 477. *Shubrick v. 1, 308 a, 309. Morley v. Boothby*, 3 *Salmond*, 3 Burr. 1639. 1 Fonbl. Eq. Bing. 111; 10 Moore, 404. *Fallowes* 344, n. a. 2 *Finch*, 108, 110.

Y. 307). But if the message is not properly forwarded, the sender is bound by it only as he sent it, and not as it was erroneously transmitted by the telegraph operator (*Prosser v. Henderson*, 20 Upper Canada, Q. B. R. 483; *Trevor v. Wood*, 41 Barb. (N. Y.) 255; *Taylor v. Steamboat Robert Campbell*, 20 Mo. (5 Bennet) 254; read 7 Am. Law. Reg. (N. S.) ch. 4, p. 215; *Beach v. Raritan, &c. R. R. Co.*, 37 N. Y. 457). In *N. Y. &c. Printing Telegraph Co. v. Dryburg*, 35 Pa. St. 298, and *Dunning v. Roberts*, 35 Barb. (N. Y.), 463; it was held that the telegraph company may be considered the common agents of both parties, and the states of Indiana (Rev. of 1860, c. 179, sec. 5), Oregon (Comp. 1866, sec. 17), and California (Act of April 18, 1862, sec. 11), enact by statute that contracts made by telegraph shall be deemed contracts made in writing. See also as to contracts by telegraph, *Kinghorn v. Montreal Telegraph Co.*, 18 Upper Can. Q. B. R. 60; *Williams v. Bicknell*, 37 Miss. 682.

Telegrams signed by a person, and relating to a contract, but not mentioning its subject-matter, are not sufficient to take the contract out of the statute of frauds, nor can this deficiency be supplied by reference, for a description of such subject-matter, to a written instrument, subsequently signed by the same person, designed to put in form the same contract, if such instrument is void as a contract, because executed in violation of a statute regarding the observance of the Lord's day. *Hazard v. Day*, 14 Allen (Mass.) 487.

the latter, by executing the deed, admits the fact, yet he always may in equity be admitted to show that the recital is untrue, and that the money was not paid. (*b*)

24. *Authentication by deed*.—The use of seals for the authentication of contracts and writings appears to have been almost unknown in England prior to the Conquest. Under the Anglo-Saxon government, contracts and written declarations and memorials were solemnly ratified with the sign of the cross in the presence of numerous witnesses, and derived all their force and efficacy from their publicity. (*c*) The custom of using a seal has prevailed in the far East from the most remote antiquity down to the present time. (*d*) The practice was brought into general use in England by the Normans after the Conquest, who caused the ancient Saxon contracts and writings to be sealed with waxen seals in the presence of witnesses, and gave them the names of charters or DEEDS. (*e*) One of the most ancient sealed documents of any authenticity in England, is the Charter of Edward the Confessor to Westminster Abbey. (*f*)

25. *Requisites of Deeds*.—"Every deed ought to have writing, sealing, and delivery; and, if the parties be illiterate, it ought to be read also." It may be printed, or written on parchment or paper; and it is

(*b*) *Wilson v. Keating*, 28 L. J., Ch 898.

(*c*) Madox. dissert. xxvi. form, Angl p. 115, 131, 136, 176. Spelman's Gloss. p. 228. Monast. Angl. vol. 5, p. 269, col. 1.

(*d*) Esther, c. 8. Jeremiah, c. 32. 1 Kings. c. 21. See also Daniel, c. 6. Lane's Arabian Nights, note II, p. 26. See the Arabian Nights, passim, as to the use of seals, and the story of the amorous lady, and the 98 "seal-rings" of her different lovers.

(*e*) Ingulph. p. 901. Selden, Eadmeri Hist. p. 166, ed. 1623. As to the use of seals, see Dugd. Antiq. Warwickshire, p. 972. Dufresne, Gloss. tom. 3, p. 854. Stabilimenta S. Ludov Reg. Fran. lib. 1, c. 70, 71. Monast. Angl. tom. 1, p. 810. Selden's titles of Honor, part 2, c. 5, p. 651, 652. Dufresne, tom. 3, p. 854.

(*f*) Co. Litt. 7 a, speaks of a sealed charter as early as A. D. 936. Vin Abr. Faits, 20.

good and valid, although it mention no time, or date, or place of making, or be dated at one time and delivered at another, or have a false or impossible date. It is essential only that it be sealed and delivered; for "any agreement in writing sealed and delivered becometh a deed." (*g*) By the common law, a deed may be written in any hand or in any language; but the legislature has required all "certificates, patents, charters, bonds, records, judgments, statutes, and recognizances," to be written in the English language. (*h*) Signing is not essential to the validity of a deed at common law, (*i*)¹ and the statute of frauds, which requires certain contracts to be authenticated by a signed writing, does not extend to deeds. (*k*)² It now rarely happens that the party executing a deed actually seals it with his own hands, or with his own seal. The seal is fixed or compressed on the deed by the person professionally employed, the executing party merely acknowledging, in the presence of witnesses, the seal to be his seal. It has been held also that one and the same seal may be the seal of half-a-dozen persons at the same time; for "if one of the officers of the forest put one seal to the rolls by assent of all the verderers and other officers, it is as good as if every one had put his several seal; as, in case divers men enter into an obligation, and they all consent, and set but one seal to it, it is a good obligation of them all." (*l*) But they must all be actually present

(*g*) 11 Co. 27 b. 28 a. Co. Litt. 171 9 C. B. N. S. 797, 803; 30 L. J., C. b. Shep. Touch. 1, ch. 4. P. 214.

(*h*) 4 Geo. 2, c. 26.

(*k*) *Cherry v. Heming*, 4 Exch. 637.

(*i*) 1 Sugd. Powers, 297. Prest. 19 L. J., Ex. 63.
 Shep. Touch. 56 b. *Cooch v. Goodman*, 2 Q. B. 597. *Tupper v. Foulkes*, 313. *R. v. Longnor*, 4 B. & Ad. 647.

(*l*) *Ball v. Dunsterville*, 4 T. R.

¹ See *Roggen v. Avery*, 63 Barb. (N. Y.) 65.

² See *Morgan's De Colyar on Guaranty, &c.*, title "Deeds" and "Statute of Frauds."

consenting to the act ; otherwise the execution is not good. (*m*) The sealing, or the acknowledgment of the seal, must be made after the deed has been written, and before its delivery ; for, if a blank piece of paper or parchment be sealed and delivered, and afterwards written upon, it is no deed ; (*n*) and, if endorsements or schedules are written or annexed to deeds after their execution, the deed must be re-sealed and re-delivered, or the subsequent addition to the contract will be nugatory and invalid. (*o*) A bail bond which has been executed before the condition was filled up has been held to be void ; (*p*) and so has a deed of conveyance or transfer of shares, executed by the proprietor of such shares with the name of the purchaser in blank, and handed over by him to the plaintiff, by whom, on the sale of such shares to defendant, the defendant's name was inserted as the purchaser. (*q*) And, if a deed be delivered, and a blank left therein be afterwards improperly filled up (at least, if that be done without the grantor's negligence), it is not the deed of the grantor. (*r*)

26. *Delivery of deeds.*—Until the sealed writing is delivered, it is not a deed. The delivery “ may be made by the party himself that doth make the deed, or by any other, by his appointment or authority precedent, or assent or agreement subsequent ; ” (*s*) and it has been held that circumstances alone may be equivalent to a delivery, where no actual delivery can

(*m*) *Harrison v. Sykes*, 7 T. R. 207.

(*n*) *Perkins*, § 118, Com. Dig. Fait. A 1.

(*o*) *Weeks v. Maillardet*, 14 East, 570. *Selin v. Price*, L. R., 2 Exch. 189.

(*p*) *Powell v. Duff*, 3 Camp. 181.

(*q*) *Hibblewhite v. M'Morine*, 6 M. & W. 200.

(*r*) *Swan v. North British Australasian Land Co.*, 2 H. & C. 175.

(*s*) *Shep. Touch.* 1, ch. 4, 57 *Tupper v. Foulkes*, 9 C. B. N. S. 797 ; 30 L. J. C. P. 214.

be proved. (t)¹ Where the party to a deed was shown to have acted under the instrument, and to have done a variety of things confirmatory of the contract, Lord Mansfield held that the acts so done amounted to an acknowledgment of the delivery of the deed. (u) If the attesting witness is called, and proves that he saw the defendant sign and seal the deed, and the plaintiff has possession of and produces the instrument, this is prima facie evidence of a delivery to the plaintiff; (x) and if a party sends forth a deed to the world as his deed, he will be estopped, as against a party who has acted on the faith of the representation, from showing that the deed is not his deed, and that he never executed it. The mere placing of a seal to a written contract will not make the contract a deed. Thus, where an action of assumpsit had been bought upon certain articles of agreement, which, when produced, were not only signed by the parties, but had a seal opposite to each signature, but it appeared that the seals had been affixed to the document through ignorance and by mistake, it was held that the placing of a seal opposite to the name

(t) *Doe v. Knight*, 5 B. & C. 689.
Thoroughgood's case, 9 Rep. 136 a.
Tupper v. Foulkes, 9 C. B. N. S. 797;
 30 L. J., C. P. 214. *Xenos v. Wickham*,
 L. R., 2 H. L. 296; 36 L. J., C. P. 313.

(u) *Goodright v. Straphan*, Cowp.
 201; Co. Litt. 36. 2 Rolle Abr. 26.
 Vin. Abr. Fait. (K).
 (x) *Hall v. Bainbridge*, 12 Q. B.
 699.

¹ The following are recent authorities as to what may constitute delivery of a deed: *Demesmey v. Gravelin*, 56 Ill. 93; *Ford v. James*, 2 Abb. (N. Y.) App. Dec. 159; *Fisher v. Beckworth*, 30 Wis. 55; *Prutsman v. Baker*, Id. 644; *Duncan v. Pope*, 47 Ga. 445; *Stanton v. Miller*, 65 Barb. (N. Y.) 58; *Kingsbury v. Burnside*, 58 Ill. 310; *Buckner v. Kingsbury*, Id.; *Comer v. Baldwin*, 16 Minn. 172. Registration of a deed does not supersede the necessity of delivery (*Hawkes v. Pike*, 105 Mass. 560); nor will a deed be presumed to have been delivered. *Burton v. Boid*, 7 Kan. 17.

of the party, though evidence of a deed and one of the formalities belonging to it, was not to be taken as conclusive; and that, if the parties did not mean to contract by deed, and had made use of the seal in ignorance of its legal effect, the contract would have the force and effect only of a common agreement.

(y) A contract, bad as a deed, may yet, under certain circumstances, be good as a common agreement.

(z)¹

27. *Delivery as an escrow.*—If a party signs and seals a deed, and places it on his drawer or his table, and another person comes and takes it away, this is not a delivery; (a) and if it should appear that the contract was delivered conditionally, and not with a view to its immediately taking effect as a deed, it is said to be delivered as an escrow, and an action can not be maintained upon it until the condition has been performed. (b)² But it does not follow that, because a deed is to be executed in duplicate, its operation is suspended until both parts have been executed and interchanged. (c)

28. *Deeds inter partes and deeds poll.*—When a

(y) *Clement v. Gunhouse*, 5 Esp. 82, 83. *Goodright v. Gregory*, Lofft. 339. *Davidson v. Cooper*, 11 M. & W. 778; 13 M. & W. 343.

(z) *R. v. Ridgwell*, 9 D. & R. 678; 6 B. & C. 665. *Hunter v. Parker*, 7 M. & W. 322.

(a) *Stanton v. Chamberlain*, Ow. 95; Cro. E. 122.

(b) *Parke, B., Bowker v. Burdekin*,

11 M. & W. 147. *Gudgen v. Bessett*, 6 Ell. & Bl. 986; 26 L. J., Q. B. 36. *Furness v. Meek*, 27 L. J., Exch. 34. *Millership v. Brookes*, 5 H. & N. 797; 29 L. J., Exch. 369. *Johnson v. Baker*, 4 B. & Ald. 440. *Murray v. Earl of Stair*, 2 B. & C. 82. Perk. sect. 137.

(c) *Kidner v. Keith*, 15 C. B. N. S. 35.

¹ A deed for the conveyance of land, signed and acknowledged by the grantor, but not delivered, can not operate as a contract or memorandum of a contract for the conveyance of land, under the Statute of Frauds. *Comer v. Baldwin*, 16 Minn. 172.

² *Prutsman v. Baker*, 30 Wis. 644.

deed is made between several persons, it is called a deed inter partes, and also an indenture. When it is made by one person alone, it is called a deed poll. The indenture, or deed indented, takes its name from the ancient practice of writing as many copies or parts of the deed as there were parties on one large sheet of parchment, in order that each party might have his part, and then cutting them off in a notched or wavy line, by which means they could at any time be compared together and identified. The deed poll was so called, because the paper was polled or cut even, there being, as there was only one party to the deed, no necessity for a counterpart.

29. *Contracts by matter of record* are contracts acknowledged in open court before an officer of the court, and recorded in the presence of the party making the acknowledgment. A record, thus made, forms unimpeachable evidence of the contract, so that the contract is proved and established by the mere production of the record. Contracts by statutes merchant and statutes staple are contracts of record; and so also are the recognizances entered into by witnesses to enforce their attendance to give evidence at a trial.¹

30. *Implied contracts.*—With certain exceptions, referred to hereinafter, men are free to make such contracts as they may deem to be for their own interests, and the law will ascertain and carry into effect the intention of the parties. This intention is generally expressed either by word of mouth or in writing; and, in such cases, the contract is called an express contract. The intention of the parties to any partic-

¹ Story makes three sorts of contracts of record, viz., Judgments Recognizances, and Statutes staple.—On Cont § 2.

ular transaction may, however, be gathered from their acts and deeds, in connection with surrounding circumstances, as well as from their words; and the law therefore implies, from the silent language of men's conduct and actions, contracts and promises as forcible and binding as those that are made by express words, or through the medium of written memorials.¹ If one man sends to the shop of another for food or clothing, or articles of merchandise, or enters an inn and takes refreshment, the law implies a contract or promise from him to pay a reasonable sum for the articles and refreshments received, though nothing has been said or stipulated concerning price or payment.² If one man is employed to work for another, the law raises an implied promise from the employer to pay the ordinary hire or reward for the work;³ and

¹ Both express and implied contracts are founded upon the actual agreement of the parties—the only distinction between them is in regard to the mode of proof, which belongs to the law of evidence. Story on Cont. § 11. In the case of an implied contract, the law supplies that which is presumed to have been inadvertently omitted by the parties. "The parties are supposed," said Chief-Justice Marshall (*Ogden v. Saunders*, 12 Wheat. 341), "to have made those stipulations which, as honest, fair, and just men they ought to have made."—So where the government takes private property for public uses. *Id.*

² 2 Kent Comm. 125, 126; *Thompson v. Hervey*, 4 Burr, 2178; *Angel v. McLellan*, 16 Mass. 31; *Van Valkenburg v. Watson*, 13 Johns. (N. Y.) 488.

³ But the law will not hasten to imply a contract to pay for services rendered by family connections (*Hartman's appeal*, 3 Grant. 271; *Butler v. Slam*, 50 Pa. St. 456; *Duffey v. Duffey*, 44 Id. 399; *Smith v. Milligan*, 43 Id. 107; *Updike v. Titus*, 2 Beasl. (N. J.) 151; *Perry v. Perry*, 2 Duer, 312. Where one does work for another in the hope of receiving a legacy, it seems there is no implied contract to pay for the services, if no legacy be given (*Davison v. Davison*, 2 Beasl. () 246; *Kennard v. Whitson*, 1 Houst. (Del.) 36; but see *Robinson v. Raynor*, 28 N. Y. 494). If a father continues to maintain his child after he becomes of age, it raises no im

if a man borrow a horse, the law implies a promise, from the borrower to the lender, to feed the animal properly and sufficiently whilst it remains in his charge and possession. (d)¹ It has been said that, "The only difference between an express and an implied contract, not under seal, is in the mode of substantiating it."² An express contract is proved by an actual agreement; an implied contract by circumstances, and the course of dealing between the parties. But whenever a contract is once proved, the consequences resulting from the breach of it must be the same, whether it be proved by direct or circumstantial evidence." (e)

31. *Division of implied contracts.*—Implied contracts have sometimes been divided into inferred contracts, implied contracts properly so called, and constructive contracts. A contract is said to be inferred where the intention of the parties is not ex-

(d) *Hanford v. Palmer*, 5 Moore, 74. 423. *Morgan v. Ravey*, 6 H. & N

(e) *Marzetti v. Williams*, 1 B. & Ad. 265; 30 L. J., Ex. 131.

plied promise that he will always do so (*Redgway v. English*, 2 Zab. (N. J.) 409; *Williams v. Hutchinson*, 3 Comst. (N. Y.) 312; *Robinson v. Cushman*, 12 Den. (Id.) 152). An agreement by a father, however, that his son or adopted son shall be paid out of his estate needs no implication to make it valid (*Updike v. Ten Broeck*, 3 Vroom (N. J.) 105; *Lunay v. Vantyne*, 40 Vt. 501). Neither will the law imply that a principal contracted to pay a surety for the use of his name (*Perrine v. Hotchkiss*, 58 Barb. 77). But it will imply in one contracting to do a certain work, that he has the skill and ability to do it (*Story on Cont.* §§ 12, 891, 1330); or upon the part of a railway company to run its trains at and upon the times advertised in its time tables. *Denton v. Gt. Northern Ry. Co.*, 5 El. & B. 860; *Hamlin v. Same*, 1 H. N. 408; *Sears v. Eastern R. R. Co.*, 14 Allen (Mass.) 433; *Bolands v. Manchester, &c. R. R. Co.*, 15 Irish, C. L. R. 560; *Wren v. Eastern Counties R. R. Co.*, 1 L. T. N. S. 5.

¹ And see *Kelly v. Andrews*, 43 Miss. 342.

² *Supra*, note 2.

pressed in words, but may be gathered from their acts and from surrounding circumstances. In these cases the law enforces what it deems to have been the intention of the parties.

It not unfrequently happens that, in the course of carrying out a contract, circumstances arise which have not been contemplated by the parties, and, consequently, where no intention has been expressed by them, or can be inferred from their acts. In such cases the law prescribes their respective rights and liabilities, according to the dictates of justice—that is, of equality—and according to what, it is presumed, their intention would have been, had they had those circumstances in their consideration when they made the contract. In a third class of cases, the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability, similar to the rights and liabilities which exist in certain cases of express contract. Thus, if one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back; for the law implies a promise from the wrong-doer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention. Implied or constructive contracts of this nature, are similar to the constructive trusts of courts of equity, and, in fact, are not contracts at all.

SECTION II.

OF THE PARTIES TO CONTRACTS.

32. Parties entitlea to enforce simple contracts.—

The interest in and right of action upon simple contracts is not confined to the parties to the contract; (f) but the person for whose use, or for whose benefit, a simple contract has been entered into, may enforce it, although he is no party to it, and although the contract is not, in express terms, made with him, but with another on his behalf, provided the consideration moves from him. In the ordinary transactions of commerce, a man may sell or purchase in his own name, and yet it does not follow that the contract is exclusively his, but the transaction is open to explanation; and others who do not appear as parties to the contract are frequently disclosed, and step in to demand the benefit of it. (g)¹

(f) *Carnegie v. Waugh*, 2 D. & R. 277. (g) Per Lord Ellenborough, *Bick-Fitzmaurice v. Waugh*, 3 D. & R. 273. *erton v. Burrell*, 5 M. & S. 386. *Sutherland v. Pratt*, 13 L. J., Ex. 246.

¹ In America as well as in England there has been no little fluctuation concerning the right of a stranger to enforce a promise made for his benefit. But it has been very recently held, upon a consideration, *noves* can not sue on the contracts, and that consequently a promise made by one person to another for the benefit of a third person who is a stranger to the consideration and promise, will not support an action as to the latter (*Story on Cont.* § 485; citing *Exchange Bank v. Rice*, 107 Mass. 37; and—when the promise is within the statute of frauds—108 Mass. 246). An exception to the above rule, it seems, will arise in cases where the defendant has money, belonging equitably to the plaintiff, in his hands.

Except in the case of bills of exchange, promissory notes, and bills of lading, parties cannot annex to their contracts the incident of negotiability, and make them floating contracts payable to bearer. Where, therefore, the owner of a quantity of iron issued a note or undertaking in writing, whereby he promised to deliver on and after a future day, 1,000 tons of iron to the party who should lodge the note or undertaking with him, it was held that the instrument was invalid; for the law does not give a floating right of action to any one into whose hands such a writing may come. (*h*)¹ But, if a man publishes an

(*h*) *Dixon v. Bovill*, 3 Macq. 2 Ell. & Ell. 349; 29 L. J. Q. H. L. C. 16. *Williams v. Lake*, B. 1.

Story on Cont. § 485; and see *Metlen v. Whipple*, 1 Gray (Mass.) 317; *Millard v. Baldwin*, 3 Id. 484; *Field v. Crawford*, 6 Id. 116; *Dow v. Clark*, 7 Id. 198; *Colburn v. Phillips*, 13 Id. 64; *Flint v. Pierce*, 98 Mass. 68. See *post*, note to Book I. chapter iv. part 2, § —, novation.

¹ So a contract for the performance of personal duties or services is unassignable, so as to vest in the assignee the right to give directions to and have control over the person who has contracted to perform the services. And where a defendant had bound himself to give theatrical performances for A. at any place, A. might direct, for a time certain, and not to perform for any one else, held, that A. could not assign his rights under this contract to the plaintiff, in such a way as to give the plaintiff the right to prevent defendant from giving performances for other persons, or to entitle him to a *re-exat* against the defendant (*Hayes v. Willis*, 4 Daly (N. Y.) 259; reversing 11 Abb. Pr. (N. S. 167)). A contract to render personal services, in general, is unassignable (*Burrill on Assignments*, 72; *Hulbert v. Deering*, 4 Little. 9, 10; *Henry v. Hughes*, 1 J. J. Marsh. 454; *Marcum v. Hereford*, 8 Dana. 1; *Davenport v. Gentry's Admr.*, 9 B. Mon. 457). A contract is assignable only where the entire interest therein can pass by the assignment both legal and equitable (*White v. Buck*, 7 B. Mon. 546); and see as to statutory assignments in Kentucky, *Sirlott v. Tandy*, 3 Dana, 142; in Arkansas, *Lafferty v. Ruthford*, 5 Pike, 649). An assignment of the indentures of an

advertisement promising to give a sum of money to any person who shall give certain information, there is a contract with the person who performs the condition. (i)¹ So, if a man signs and circulates a promise, or agreement in writing, to pay a certain specified sum of money to any person who shall do a particular act, and the writing is delivered to a party who does the act on the faith of the promise, such party is entitled to the money promised to be paid. Therefore, where the defendant, who was the master of a vessel, gave a written undertaking under his hand to pay £6 to any person who should advance to a sailor that sum, provided the sailor should sail in the defendant's ship, then about to start; it was held that the plaintiff,

(i) *Williams v. Carwardine*, 4 B. & Ad. 621.

apprentice merely operates as a covenant that they shall serve the assignee (*Neckerson v. Howard*, 19 Johns. (N. Y.) 113). Except as to the indenture of an infant immigrant to pay his passage as authorized by 2 R. S. (N. Y.) 156, §§ 12, 13, 14; and as to convicts the right of control still remains in the officer of the state (*Homer v. Wood*, 23 N. Y. 350). And so as to the one contracting to perform the service, the rule is the same. If an artist be employed to paint a portrait, or to design a ceiling, he can not intrust the execution of the work to a third party. *Pothier v. Souage*, No. 121; *Story on Cont.* § 1321.

¹ Where a general offer is made if any one coming within the terms of the offer, and before its revocation, performs the service, a legal and binding contract arises to pay the reward (*Story on Cont.* § 493; *Symmes v. Frazier*, 6 Mass. 344; *Wentworth v. Day*, 3 Metc. 352; *Morse v. Bellows*, 7 N. H. 549; *Jones v. Phoenix Bank*, 4 Seld. (N. Y.) 228; *Freeman v. Boston*, 5 Metc. 56; *Junvrin v. Exeter*, 48 N. H. 83; *Crawshaw v. Roxbury*, 7 Gray, 374; *Crowell v. Hopkinton*, 45 N. H. 9; *Fitch v. Snedaker*, 38 N. Y. 248). But acceptance of the offer must appear (*Fitch v. Snedaker*, *supra*). Analogous to these cases appear to be cases of offers to guarantee one who will extend credit to certain parties; in all such cases the knowledge of the acceptance of the offer must be apparent, before any contract exists. See *Morgan's De Colyar on Guaranty and Principal and Surety*, pp. 3, 6, 189, and cases cited.

who had advanced £6, partly in money and partly in goods, was entitled to recover that amount from the defendant. (*j*)¹

33. *Strangers to the contract.*—If the act or service forming the cause or consideration for the promise to A be done or performed by some third party, and not by A himself, nor at his instance or by his procurement, A is said to be a stranger to the consideration, and can not enforce the contract; (*k*) but, if the act or service has been rendered to B at the instance and request, and through the instrumentality and procurement of A, the consideration moves from A so as to enable him to enforce the promise. (*l*)² Where the defendant promised the father of the plaintiff that, if the plaintiff would marry the defendant's daughter, the defendant would pay to the plaintiff £20, and the marriage was celebrated, and the plaintiff claimed the £20, and it was objected that the promise was not made to him, but to his father, the court held that the action was properly brought by the plaintiff, who had performed the meritorious act forming the consideration for the promise. (*m*) But where, after the marriage, the fathers of the husband and wife agreed together that each should pay a sum of money to the husband, and that the latter should have full power to

(*j*) *M'Kune v. Joynson*, 5 C. B. N. S. 218; 28 L. J., C. P. 133. But see *Williams v. Lake*, *supra*.

(*k*) *Price v. Easton*, 4 B. & Ad. 434; 1 N. & M. 303. *Crow v. Rogers*, 1 Str. 592. *Bourne v. Mason*, 1 Ventr. 6; 2 Keb. 457.

(*l*) *Curtis v. Collingwood*, 1 Ventr. 297. *Lampleigh v. Braithwaite*, 1 Smith's L. C. 135, 5th ed. Hob. 105.

Townsend v. Hunt, 10. Car. 480. *Denman, C. J., Eastwood v. Kenyon*, 11 Ad. & E. 452. *Martyn v. Hind*, 1 Cowp. 437; 1 Doug. 142.

(*m*) *Provender v. Wood*, 11et. 30. *Agacio v. Forbes*, 14 Moo. P. C. 171. And see *Garrett v. Handley*, 3 B. & C. 462; 5 D. & R. 319; 4 B. & C. 664; 7 D. & R. 144. *Thatcher v. England*, 3 C. B. 262.

¹ *Id.*

² As to performance by stranger, see note, p. 58.

sue for the money, it was held, nevertheless, that the husband, not being a party to the agreement, could not enforce it. (n) ¹

If there is a benefit to the defendant, and a loss to the plaintiff, directly resulting from the defendant's promise in favor of the plaintiff, there is a sufficient cause or consideration moving from the plaintiff to enable the latter to maintain an action upon the promise. Where Sir Edward Poole being about to cut down £1,000 worth of timber on his estate, for the purpose of portioning his daughter Grisel, the eldest son and heir promised Sir Edward that, if he would not fell the timber, he, the son, would pay his sister Grisel £1,000, and Sir Edward, confiding in his son's promise, allowed the timber to stand, and after his death the land, with the timber growing thereon, descended to the son, who then refused to fulfil his promise, whereupon the daughter and her husband brought an action against him, it was held that the action was well brought, for the son had the benefit of having the timber, and the daughter had lost her portion by reason of the brother's promise. (o) So where Rockwood being about to charge his lands with £40 per annum to each of his younger sons for their lives, the eldest son desired him not to charge the land, and promised to pay the younger sons duly the £40, and Rockwood, confiding in this promise, neglected to make the provision he had intended for his younger children out of the land, and after his death

(n) *Tweddle v. Atkinson*, 1 B. & S. 393; 30 L. J., Q. B. 265.

(o) *Dutton v. Poole*, 2 Lev. 210; 1 Vent. 318, 334; *T. Jones*, 102; affirmed n error in the Exchequer

Chamber, T. Raym. 302. "It is difficult to conceive," said Lord Mansfield, "how a doubt could be entertained in the case of *Dutton v. Poole*," *Martyn v. Hind*, 1 Cowp. 437; 1 Doug. 142.

¹ Id. See *Reeves' Domestic Relations*. Parker and Baldwin's Am. Ed., p. 334

the eldest son refused to fulfill his promise; whereupon the two younger sons brought an action for the recovery of the money, the whole court held clearly that the action was well brought, and that it was a good consideration; for the defendant's land would have been charged with the rents but for his promise to pay the money to the plaintiffs. (*p*) In these cases the consideration indirectly moves from the party in whose favor the promise is made.

It was formerly held that the near realationship of parent and child, extended to the child an interest in a contract entered into by the parent, in its behalf and for its benefit; that the parent might be considered as the mere agent of the child in whose behalf and for whose benefit the contract was made, and that the latter might consequently maintain an action upon it. (*q*) Thus, where the defendant promised a physician that, if he succeeded in effecting a particular cure, he, the defendant, would give a certain sum of money to the physician's daughter, and the daughter brought the action, it was adjudged maintainable: "for the nearness of the relation gives the daughter the benefit of the consideration performed by the father." (*r*) But these cases could not now be supported at law, (*s*)¹ although in equity a third person,

(*p*) *Rockwood's case*, Cro. Eliz. 164. (*r*) *Bourne v. Mason*, 1 Ventr. 6.
 And see *Story Com. on Eq. Jur.* § 64. *Levet v. Hawes*, Cro. Eliz. 619, 652;
 (*q*) *Dutton v. Poole*, 2 Lev. 211; Het. 176. *Rainer v. Mortimer*, 1,
Hardr. 321. *Thomas v. —*, *Styles*, Brownl. 40.
 461. *Bafeild v. Collard*, Ayleyn, 1. (*s*) *Tweddle v. Atkinson*, ante, p.
Rippon v. Norton, Cro. Eliz. 849, 881. 60.

¹ *Story*, after citing the cases referred to in the text (*Bourne v. Mason*; *Dulton v. Poole*; *Levet v. Hawes*), and referring to the somewhat analogous cases of *Brewer v. Dyer*, 7 Cush. 337; *Mellen v. Whipper*, 1 Gray, 323, holding that where premises belonging to a third person are sublet, the

particularly if he were a relation, might enforce a stipulation made by another in his favor, and for which that other had given valuable consideration, with the view of benefiting such third person. But, if the party making the stipulation released the promisor, the third party could not enforce it, unless his condition in life had been altered by and in consequence of the stipulation. (*t*) Where the uncle and guardian of an infant, at the request of the infant, delivered £12 to J. S. to educate the infant, and, in consideration of this, J. S. promised to educate the infant, and to pay the infant £12 when he came of age, it was held that the latter was the proper party to maintain an action for the non-payment of the £12. (*u*) An action will not lie against a railway company, as carriers of passengers for hire, at the suit of a master for a personal injury sustained through their negligence by his servant, whereby the master lost the benefit of the services of the servant; the contract out of which rose the duty to carry safely being a contract between the company and the servant. (*w*) So, also, where a master sent forward his servant by train with his portmanteau, and it was delivered by the servant and accepted by the company as part of the servant's luggage, nothing being said as to the ownership of the portmanteau, it was held that no action lay against

(*t*) 2 Spence's Eq. Jur., ii. p. 280-286.

(*w*) *Alton v. Midland Ry. Co.* 19

(*u*) *Oilham v. Bateman.* 1 Rolle Abr. 31, pl. 8.

C. B. N. S. 213; 34 L. J., C. P. 292

undertenant agreeing to pay over the rent to the landlord, without privity of the latter, the landlord may sue the subtenant for the rent, says: "But the cases of this class have been overruled in England, and denied in America; and it is now held, that nearness of relationship and consequent interest in the promise are not sufficient to raise a privity of contract." Story on Cont. § 486; *Exchange Bank v. Rice*, 107 Mass. 37.

the company by the master for the loss of his portmanteau, on the ground that the contract was between the company and the servant. (x) And, where a telegraph company negligently mis-sent a message containing an offer for a cargo of ice to the vendor, in consequence of which the vendor incurred expense, it was held that he could not sue the telegraph company, because their contract was with the sender of the message and not with the receiver, although, if a sale had been effected, the vendor would, by the course of the trade, have been bound to re-pay the sender the cost of the message. (y)

34. *Parties to contracts with bankers, warehousemen, and wharfingers.*—If money is sent to the banker for the payment of certain debts, the consideration for a promise by the banker to pay over the money, pursuant to the directions he has received is said to move from the creditor whose particular debt is to be paid, and who is the object of the remittance; it being considered that the debtor is the agent of the creditor, and that the money is paid indirectly to the banker by the latter. (z)¹ But in all cases where money is sent to one person to be paid by him to another, to enable the person who is the object of the remittance to maintain an action against the remittee to recover the amount transmitted to him, there must be an express promise or assent on the part of the latter to pay over the money to the former, or to hold it to his use, inasmuch as the mandate is revocable so

(x) *Becker v. The Great Eastern Ry. Co.*, L. R., 5 Q. B. 241. But it is difficult to understand why the plaintiff was not entitled to recover the value of the portmanteau on the ground that it was his property.

(y) *Playford v. United Kingdom Telegraph Co.*, L. R. 4; Q. B. 706.

(z) *Lilly v. Hays*, 5 Ad & E. 548
Moore v. Bushell, 27 L. J., Ex. 3
Noble v. Nat. Disct. Co., 5 H & N 228; 29 L. J., Ex. 210.

¹ Story on Cont. § 487.

long as no such assent, promise, or engagement, has been given or entered into. (a) When, however, the assent has been given, and the attornment made the order to pay the money, if founded upon a precedent debt or other good consideration, becomes irrevocable, (b)¹ the creditor looks no longer to the security of his original debtor, but relies on the assent of the remittee, which can not be retracted, and is entitled to maintain an action against him for the amount received. (c)² But, if the amount transmitted be a mere voluntary gift or donation, founded upon no precedent consideration, debt, or duty, the authority may be revoked at any time before the money is actually paid over by the remittee, (d) just as money, when paid by mistake to an agent, and placed by him to the account of his principal, but not paid over, may be recovered back by the party who has inadvertently transmitted it. (e) Subject to these qualifications, some of the old cases in Rolle's Abridgment, where it has been held that, if £20 be delivered to B to pay over to C, C can maintain an action against B to recover this money, or that, when goods are given by A to B, under an agreement that B shall pay £20 to C, that becomes a debt due to C, may still be considered

(a) *Williams v. Everett*, 14 East, 597. *Fisher v. Miller*, 7 Moore, 537. *Baron v. Husband*, 4 B. & Ad. 611. *Howell v. Batt*, 5 B. & Ad. 504; 2 N. & M. 381. *Wedlake v. Hurley*, 1 C. & J. 83. *Grant v. Austen*, 3 Price 58. *Brind v. Hampshire*, 1 M. & W. 373. *Hill v. Royds*, L. R. 8 Eq. 292.

(b) *Winter v. Foweracres*, 2 Roll. Rep. 39, 40. *Robertson v. Fauntle-*

roy, 8 Moore, 10. *Atkin v. Barwick*, 1 Str. 165. *Hodgson v. Anderson*, 3 B. & C. 842; 5 D. & R. 744. *Walker v. Rostron*, 9 M. & W. 411. *Griffin v. Weatherby*, L. R., 3 Q. B. 753.

(c) *Best, C. J., Gibson v. Minet*, 9 Moore, 36.

(d) *Lyte v. Peny, Dyer*, 49 a, b, 17. *Taylor v. Lendey*, 9 East, 54.

(e) *Buller v. Harrison*, 2 Cowp. 565.

¹ Id.

² Id.

good law. (*f*) Warehousemen, wharfingers, and bailees of goods, stand in the same situation as bankers and depositaries of money; and, when they have accepted a delivery order, presented to them by a purchaser, they become the bailees of the party mentioned in such order, and are liable to him upon their promise to hold the goods on his account and at his disposal. (*g*)¹

35. *Parties entitled to enforce contracts under seal.*—As a contract under seal requires no consideration to support it, the common law regarded only the instrument itself;² and whenever a deed was expressed to be made between certain persons named in the premises of the instrument, or described therein as the contracting parties, those persons only and their privies claiming through them by blood, representation, or otherwise, could take advantage of it by way of action. (*h*) It mattered not that the deed was made for the exclusive benefit or use of other individuals named therein, and contained covenants with them for the performance of certain duties, if they had not been made parties to the contract they could not sue thereon, although they might have

(*f*) *Starkey v. Mylne*, 1 R. Abr. p. 32, pl. 13. *Disborne v. Denabie*, ib., p. 30, 31, Z. pl. 5.

(*g*) *Bryans v. Nix*, 4 M. & W. 791.

(*h*) *Chesterfield and Midland Silkstone Colliery Co. v. Hawkins*, 3 H. & C. 657; 34 L. J., Ex. 121.

¹ See *Scudder v. Worster*, 11 Cush. (Mass.) 573.

² Neither will the construction of the contract depend upon the question whether it is under seal (1 Hilliard on Cont. p. 281); though it is sometimes held, that commercial contracts are to be construed with peculiar liberality (*Bell v. Bruen*, 1 How. 169). As to necessity of a consideration in a deed, see *Cunningham v. Freeborn*, 11 Wend. 248; *Jackson v. Post*, 15 Id. 588; *Jackson v. Peck*, 4 Id. 300; *Jackson v. Zimmermann*, 7 Id. 437; *Minturn v. Seymour*, 4 Johns. Ch. (N. Y.) 497; *Acker v. Phoenix*, 4 Paige, 305; *Wood v. Jackson*, 8 Wend. 9.

sealed and delivered the deed in common with those who were formally described as the parties to the instrument. (z) And although the 8 & 9 Vict. c. 106, enacted that, after the 1st of October, 1845, an immediate estate or interest, and the benefit of a condition or covenant respecting any tenements or hereditaments, might be taken, although the taker thereof was not named a party to the same indenture, (k) this enactment was held only to apply to covenants respecting any tenements or hereditaments; and, therefore, where a composition deed was expressed to be made between "the several persons whose names and seals are subscribed and affixed in the schedule hereunder written, being creditors executing these presents as parties of the first part," and other parties, it was held that creditors who did not execute the deed were not parties to it, and could not take advantage of the covenants contained therein, although they were expressed to be made with the parties of the first part and all other creditors. (l) But, where a similar deed was expressed to be made with all the creditors, it was held that all were parties, and could sue on the covenants, which were expressed to be made with each creditor severally. (m) When a deed was not made reciprocal between parties of the one part and parties of the other part, but was expressed to be made generally "to all" in the nature of a deed poll, then, if any one or more persons contracted or coven-

(i) *Gilby v. Copley*, 3 Lev. 138. *Berkley v. Hardy*, 8 D. & R. 102; 5 B. & C. 355. *Lord Southampton v. Brown* 6 B. & C. 718. *Metcalf v. Rycroft*, 6 M. & S. 75.

(k) And see the 7 & 8 Vict. c. 76, s. 11.

(l) *Chesterfield and Midland Silk-*

stone Colliery Co. v. Hawkins, 3 H. & C. 677; 34 L. J., Ex. 121. *Gurrin v. Ropera*, 3 H. & C. 694; 34 L. J., Ex. 128.

(m) *Gresty v. Gibson*, 4 H. & C. 28 L. R., 1 Ex. 112; 35 L. J., Ex. 74. *Reeves v. Watts*, L. R., 1 Q. B. 412, 35 L. J., Q. B. 171.

anted therein with a stranger, the latter might bring an action upon the deed against the parties so covenanting and contracting, provided they had duly sealed and executed the instrument, as in the case of an ordinary bond or obligation, "where fifty persons may be bound to one who is no party to the instrument, and all are liable to an action at his suit." (*n*)¹

When there was no formal commencement to a deed describing who were the parties to it, and whose deed it was, it was held to be the deed of those who were named in the instrument as the contracting parties, and who put their seals to it. (*o*) But they must have been named or designated in the body of the deed; for no person could maintain an action upon a contract under seal unless he was named therein, either by his own name or by some acquired or adopted name; (*p*) and the contract or covenant must in express terms have been made with him. (*q*)²

36. *Trustee and cestui que trust.*—It was a fixed rule of law that the action upon a contract under seal, whether such contract was a deed inter partes or a deed poll, must be brought by the party with whom the contract was in terms made, and only by the person on whose behalf, or for whose benefit it had been made. (*r*) In those cases the party to whose use or for whose benefit the contract had been entered into had a remedy in equity against the person with

(*n*) *Cooker v. Child*, 2 Lev. 74.

(*o*) *Nurse v. Framton*, 1 Ld. Raym. 28.

(*p*) *Maughan v. Sharpe*, 17 C. B. N.

S. 443; 34 L. J., C. P. 19.

(*q*) *Sund. Marine Ins. Co. v. Kear-*

ney, 16 Q. B. 935; 20 L. J., Q. B.,

421.

(*r*) *Offly v. Warde*, 1 Lev. 235.

Barford v. Stuckey, 5 Moore, 23; 2 B.

& B. 333.

¹ See *Newell v. Hill*, 2 Metc. 180; *Kempton v. Walker*, 9 Verm. 191; *Goodwin v. Gilbert*, 9 Mass. 510.

² But see Note 1.

whom it was expressed to be made. The Court of Chancery deemed the latter trustee for the former, and would compel him to execute his trust according to the apparent intention of the contracting parties. Hence, the one was technically said to have the legal and the other the equitable interest in the contract. When, however, no express promise or engagement was entered into with some person or persons in particular, the case was different. If, for example, a man by writing, sealed and delivered, acknowledged generally that he had received a particular sum of money to the use of A, this made him a debtor to A to the amount specified. (s)¹ A bill or receipt under seal was couched in the following terms: "Received of A £40, to the use of B & C, equally to be divided between them, to be repaid at such time as shall be most to the profit of B & C;" and it was held that this was an engagement with B & C to pay the money to them whenever they required it, and that B & C might consequently maintain an action for the recovery of the £40. (t)

These distinctions have, however, become of less consequence since the passing of the Supreme Court of Judicature Act, 1873, by the operation of which the beneficial interests arising under deeds will be recognized in every court as amply as they were formerly in the Courts of Equity.

37. *Covenantees who have omitted to execute the deed.*—It is not in general necessary that those who

(s) *Core v. Woddy*, Dyer, 23, a. 729. *Sund. Marine Ins. Co. v. Kear-*

(t) *Shaw v. Sherewood*, Cro. Eliz. ney, 16 Q. B. 935.

¹ As to receipts and estoppel thereby, see *Stackpole v. Arnold*, 11 Mass. 27; *Harden v. Gorden*, 2 Mason, 561; *Vanclee v. Therasson*, 3 Pick. 12; *Melledge v. Boston Iron Co.* 5 Cush. 158; *Putnam v. Lewis*, 8 Johns. 389.

have been made parties to a deed inter partes should execute the deed to be enabled to sue thereon. (*u*) Neither need a grantee under a deed execute, provided he has been made a party to the deed; for the law presumes his assent to the grant in the absence of an express disclaimer. (*x*) Where real property, therefore, is conveyed to trustees parties to a deed, it is not necessary for them to execute, as the legal estate forthwith vests in them unless they disclaim the grant; and, if one of the trustees renounces, the whole property vests in those who accept the trust. (*y*) When, however, the execution of the deed by one of the parties is necessary to create or transfer some estate or interest, the creation or transfer of which forms the foundation or consideration for the covenants and stipulations contained in the deed, the party neglecting to execute can not then maintain an action upon the covenants. (*z*) Where tenant for life and remainder-man are parties to an indenture, whereby they (so far as they legally can and may, according only to their respective estates and interest) demise their estate for a term of years, and the lessee enters into possession, the tenant for life may sue him for breach of covenant, although the indenture has not been executed by the remainder-man. (*a*)

38. *Parties liable upon simple contracts.*—A person who signs a promissory note or an undertaking on behalf of another, (*b*) or who is made a party to an

(*u*) *Rose v. Poulton*, 2 B. & Ad. 830.

(*x*) *Townson v. Tickell*, 3 B. & Ald. 31. The disclaimer of a grant of reality should be made by deed. *Fitz. Ab. Joint-Tenancy*, pl. 9.

(*y*) *Small v. Marwood*, 9 B. & C. 300.

(*z*) *Antram v. Chace*, 15 East. 212. *Dover*, in re, 18 Jur. 52. *Morgan v. Pike*, 14 C. B. 473.

(*a*) *How v. Greek*, 3 H. & C. 391; 34 L. J. Ex. 4.

(*b*) *Iveson v. Conington*, 2 D. & R. 309. In re *Gee*, 10 Jur. 694. *Furrell v. Jones*, 3 B. & Ald. 47, 51.

agreement *inter partes*, and signs it in his own name on behalf of another, will himself be personally responsible for the fulfillment of the contract, unless it clearly appears that he executed it as agent only, and that it was not intended that he should be personally liable upon it. (c)¹ Where the plaintiff agreed with two

(c) *Cooke v. Wilson*, 1 C. B. N. S. Bl. 942; 27 L. J. Q. B. 49. *Deslandes v. 164. Lennard v. Robinson*, 5 Ell. Gregory, 29 L. J. Q. B. 95; 30 Id. 36.

¹ *Fowler v. Shearer*, 7 Mass. 14; *Elwell v. Shaw*, 16 Id. 42; S. C. 1 Greenl. 339; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198; *Lutz v. Linchicum*, 8 Peters, 165; *Brinley v. Mann*, 2 Cush. 337; *Clark's Exrs. v. Wilson*, 3 Wash. S. C. 560; *Abbey v. Chase*, 6 Cush. 57; *Stetson v. Patten*, 2 Greenl. 358; *Jefts v. York*, 4 Cush. 371; *Moor v. Wilson*, 6 Foster, 332; *Haven v. Adams*, 4 Allen, 80.

The mere order in which names are written is not material, though it may be considered in determining the capacity in which a party signs a paper. The relative position of the signatures is not sufficient, however, to create a presumption as to which is principal and which is surety (*Doughty v. Bacot*, 2 Dersauss (S. C.), 546, and see *Rutledge v. Greenwood*, 2 Id. 389; *Monson v. Drakeley*, 40 Conn. 553; and cases cited in *Morgan's Decolyar on Guaranty*, 357, note). And the rule might apply to a case of principal and agent. The proper mode of subscribing an instrument as agent, would be to sign the name of the principal first, and then to add "by his attorney," or "his agent," A. B. But this is not, as we have said, material (*Mussey v. Scott*, 5 Cush. (Mass.) 212). It would be an invalid execution of a deed by an agent, to sign merely his principal's name without adding any words indicating an agency (*For-syth v. Day*, 41 Me. 382; *Hunter v. Giddings*, 97 Mass. 41; but see *Wood v. Goodridge*, 6 Cush. 120).

But all parol contracts, especially maritime and commercial contracts, which are, in general, carelessly and loosely drawn, the intention rather than the formalities of the instrument will be considered (*Story on Agency*, § 154; *Barlow v. Congregational Soc.*, 8 Allen (Mass.), 460; *Hunter v. Miller*, 6 B. Mon. 612; *Rogers v. March*, 33 Me. 106; *N. E. Mar. Ins. Co. v. DeWolf*, 8 Pick. 56; *Stackpole v. Arnold*, 11 Mass. 27). So where a note began "I promise," and was signed per C. D. A. B., it was held to bind the principal (*Long v. Colburn*

persons "to pave their streets in Putney," and they, "on behalf of the parish, agreed to pay him" therefor, it was held that, as the parish could not be sued upon such an undertaking, the work must have been taken to have been done upon the personal security and credit of the promisors, and that they were therefor personally liable upon their agreement. (*d*) So, where the respective attorneys for the prosecutor and defendants, on an indictment against the same parish for not re-paving a road, entered into an agreement, by which the attorney for the prosecutor agreed that the recognizances should be respited, and the attorney for the defendants agreed, "on the part of the parish," to pay the costs, it was held that the agreement was personally binding upon the attorney for the defendants. (*e*) An undertaking by one man on behalf of another may either be the undertaking of an agent, or of a principal and sole contracting party who comes forward to secure, on his own credit and responsibility,

(*d*) *Meriel v. Wymondsold*, Hardr. 205. (*e*) *Watson v. Murrell*, 1 C. & P. 307.

11 Mass. 97); and see the case of a bond so signed (*Bray v. Kettel*, 1 Allen (Mass.) 80). So where A, an agent, wrote on a note, by authority from B, I hereby guaranty the payment of this note, and signed his own name, it was held to be the guaranty of the principal and not of the agent (*N. E. Mar. Ins. Co. v. DeWolf*, 8 Pick. 56; *Passmore v. Mott*, 2 Bin. 201; and see *Wiley v. Shank*, 4 Blackf. 420; *Fiske v. Eldridge*, 12 Gray, 474; *Haverill &c. Ins. Co. v. Newhall*, 1 Allen, 130; *Bank of British N. A. v. Hooper*, 5 Gray (Mass.) 567; *Slawson v. Loring*, 5 Allen, 340; *Brown v. Parker*, 7 Allen, 337). Where A, as agent, signed a receipt "for the owners," he was held not to be personally liable (*Waddell v. Mordecai*, 3 Hill (S. C.), 22; and see *Lerned v. Johns*, 9 Allen (Mass.), 419; *Ellis v. Pulsefer*, 4 Id. 165; and see *Brockway v. Allen*, 17 Wend. (N. Y.) 40; *Mott v. Hicks*, 1 Cow. (N. Y.) 155; *Barker v. Mechanics', &c. Ins. Co.*, 3 Wend. 94; *Hills v. Barrister*, 8 Cow. 31; *Mann v. Chandler*, 9 Mass. 335; *Ballou v. Talbott*, 16 Id. 461; *Pentz v. Stanton*, 10 Wend. 271; *Emerson v. Prov. Mfg. Co.*, 12 Mass. 237.

some benefit and advantage for a friend; (*f*) or it may be the undertaking and guarantee of a surety, who binds himself for the performance of some act or duty by a third party who is to be primarily liable upon the contract.¹

One person may, as we have already seen, have the benefit of the performance of the consideration for a simple contract or promise, and another may be liable upon it as the really contracting party: "If A contracts with B to make a coat for C, A must pay for it, though C wears it." But, if the plaintiff has made the party to whom the goods have been furnished his debtor,—if, for instance, he describes him as such in his books, or in letters,—he can only treat the other as a surety. (*g*) Where the defendant gave a written undertaking to pay the directors of the Manchester Gas Works for all the gas which may be consumed in the theater during the time that it is occupied by my brother-in-law, Mr. Neville," it was held that he might be made liable as the primary and sole debtor in an action for goods sold and delivered. (*h*)

Where the managers of a particular undertaking, having a public, or corporate, or partnership fund at

(*f*) *Redhead v. Cator*, 1 Stark. 14.
Hall v. Ashurst, 1 Cr. & M. 714.
Downman v. Jones, 14 L. J. Q. B.
 228. *Harper v. Williams*, 4 Q. B.
 235. *Johnson v. Ogilby*, 3 P. Wms.
 277.

(*g*) *Austen v. Baker*, 12 Mod. 250.
Anderson v. Hayman, 1 H. Bl. 121.
Langdale v. Parry, 2 D. & R. 37,
 340.
 (*h*) *Wood v. Benson*, 2 C. & J. 94
Edge v. Frost, 4 D. & R. 245.

¹ It must, however, clearly appear, from the terms or nature of the contract, that the agent intended to assume no personal responsibility. An agent is competent to bind himself, and, unless he make it appear that he does not do so, it will be understood that he does (*Savage v. Rex*, 9 Nott. 263; *Stackpole v. Arnold*, 11 Mass. 27, 29; *Dewall v. Craig*, 2 Wheat 45; *Palmer v. Stephens*, 1 Den. 471; *Negus v. Simpson*, 99 Mass. 388.

their disposal, or power to impose assessments or make calls, and create a fund to defray expenses, employ workmen and servants, they will be personally responsible for the payment of the parties they employ if credit has been given to them and not to the fund at their disposal. But, "whether any contract is made, or on what terms it is made, must depend upon the circumstances of each case. If a party merely speculates on the chance of being paid, taking the risk whether funds will be collected and appropriated to his demand or not, there is no contract." (i) If he is to be paid, provided the requisite funds are obtained and not otherwise, there is a conditional contract which becomes absolute as soon as funds have been received. (k) ¹

39. *Parties liable upon deeds.*—A person not made

- (i) *Landmann v. Entwistle*, 7 Exch. 100. *Andrews v. Dally*, 4 Bing. 632. *Giles v. Smith*, 11 Jur. 334. 566.
Alexander v. Worman, 6 H. & N. (k) *Higgins v. Hopkins*, 3 Exch. 163; 18 L. J., Ex. 113.

¹ Personal liability is inconsistent with a perfect body corporate; see Angel and Ames on corporations § 41; *Hurger v. McCulloch*, 2 Den. 77; *Hopkins v. Whitesides*, Head. 31. But equity will often decree such liability, and in many of the states the same is regulated by statute.—The return of an execution unsatisfied against a corporation (*Castleman v. Holmes*, 4 J. J. Marsh. 1; *Drinkwater v. Portland, &c. Co.*, 18 Maine, 35; *Grose v. Hilt*, 36 Id. 22; *Chaffin v. Cummins*, 37 Id. 77; *Came v. Brigham*, 39 Id. 35; *Whitney v. Hammond*, 44 Id. 305). In an action against a stockholder under the Maine statute, it is necessary to establish the existence and organization of the corporation, and a judgment obtained against the corporation is not conclusive of such existence in an action to which he is a stranger (*Hudson v. Carman*, 41 Me. 84). In *Coffin v. Rich* (45 Id. 507), held, that the repeal of a statute making stockholders personally liable for the debts of a corporation, was not a law impairing the obligation of contracts, as to debts contracted before the repeal; but in *Hawthorne v. Calef* (2 Wall. 10), the United States Supreme Court decided the reverse. In Georgia, notice of the execution

a party to a deed may render himself liable to be sued thereon by sealing and delivering the deed : for one who is no party to a deed may covenant with another who is a party, and thereby be bound ; he may oblige himself by the deed, if there be express words to it, and the deed be sealed by him. (1)¹ A man may

(1) *Holt C. J., Salter v. Kidgley, Holt, 210 ; Carth. 76.*

against the company must first be brought home to the stockholder ; as to the rule in New Hampshire, see *Hicks v. Burns*, 38 N. H. 141 ; *Haynes v. Brown*, 36 Id. 544. See also *Bond v. Appleton*, 8 Mass. 474 ; *McDougland v. Bellamy*, 18 Ga. 44 ; see, as to the Massachusetts statute, *Child v. Coffin*, 17 Mass. 64 ; *Ripley v. Sampson*, 10 Pick. 371 ; *Cutler v. Middlesex, &c. Co.* 14 Id. 483 ; *Marcy v. Clark*, 17 Mass. 335 ; *Stedman v. Eveleth*, 6 Metc. 114 ; *Mill Dam Foundry v. Hovey*, 21 Pick. 417 ; *Carver v. Braintree Mfg. Co.*, 2 Story, 431 ; *Gray v. Bennett*, 3 Metc. 522, 530 ; *Curtis v. Harlow*, 12 Id. 3 ; *Richmond v. Willis*, 13 Gray, 182 ; *Thayer v. Union Tool Co.*, 4 Id. 75 ; *Denny v. Richardson*, 4 Id. 274. In N. Y., *Corn- ing v. McCullough*, 1 N. Y. 47 ; *Worrall v. Judson*, 5 Barb. 210 ; *Abbott v. Aspinwall*, 26 Id. 202 ; *Matter of Hollister Bank*, 27 N. Y. 393 ; *Seymour v. Sturgis*, 26 Id. 134 ; *Bangs v. Gray*, 12 Id. 477. In Rhode Island, *Atwood v. R. I. Agricultural Bank*, 1 R. I. 376, &c., &c. ; and see generally for this individual liability, and when it will be enforced, *Provident, &c. Institution v. Jackson, &c. Rink*, 52 Mo. 552 ; *Basshor v. Forbes*, 36 Md. 154 ; *Booth v. Campbell*, 37 Id. 522 ; *Norfolk v. American, &c. Gas Co.*, 108 Mass. 404 ; *Thayer v. N. E., &c. Printing Co.*, Id. 523 ; *Hall v. Sigel*, 7 Lans. (N. Y.) 206 ; 13 Abb. Pr. N. S. 178 ; *National, &c. Bank v. Nichols*, 2 Biss. 146 ; *Hooker v. Kilgour*, 2 Cin. (Ohio) 350 ; *State, &c. Association v. Kellogg*, 52 Mo. 583 ; *Comanche Mining Co. v. Rumley*, 1 Mon. T. 201 ; *Mann v. Currie*, 2 Barb. 294 ; *Hathorn v. Calef*, 53 Me. 471 ; *Cummings v. Maxwell*, 45 Id. 190 ; *Coffin v. Rich*, 45 Id. 507 ; *Carrol v. Hinkley*, 46 Id. 81 ; *Ingalls v. Cole*, 47 Id. 530 ; *Ochiltrer v. Iowa, &c. R. R. Co.*, 54 Mo. 113 ; *Hudley v. Russell*, 40 N. H. 109 ; *Chaffin v. Cummings*, 37 Me. 76 ; *Drinkwater v. Portland, &c. R. R. Co.*, 18 Id. 35 ; *Corse v. Sandford*, 14 Id. 235 ; *Gallagher v. Ashby*, 26 Barb. 143 ; *Conant v. Van Schaick*, 24 Id. 87 ; *Chesley v. Pierce*, 32 N. H. 389.

¹ One who signs, seals, and delivers a deed is bound as

also be bound by the covenants of a deed in which he is described as a party, though he does not execute it, if he assents to it, and takes a benefit under it, and treats the contract as his deed. (m)¹ If a party sends forth a deed to the world as his deed, he can not be heard to say that the instrument so sent forth as his own, professed to be signed by his own name, and to be sealed with his seal, is not his deed. If he intended to have the benefit of the representation, he can not reject the burthen: he can not be heard to say, against those who have dealt with him on the strength of the deed being his deed, that it is not his deed, that it was never executed by him, or that it was executed without his sanction or authority. (n)² If,

(m) *Webb v. Spicer*, 13 Q. B. 893; (n) *Ex parte Straffon*, 16 Jur. 18 L. J., Q. B. 142. 440.

grantor by such acts, although he is not named as grantor in the deed, but see *Hornbeck v. Westbrook*, 9 Johns. (N. Y.) 73; *Garnett v. Garnett*, 7 T. B. Mon. (Ky.) 545.

¹ An indenture in which several persons are represented as parties of the one part, is the deed of as many persons of that part, as execute and deliver it, though it be not signed by them all (*Scott v. Whipple*, 5 Me. (5 Greene) 336). And where deeds indented are interchangeably executed, each party of the indenture is the deed of both party, as well when one part is executed by either party, as when both parties execute each part (*Dudley v. Sumner*, 5 Mass. 438). Where the grantee in an indenture of bargain and sale of land, which purports to be inter partes, and by which an estate is conveyed to the grantee, accepts the deed and the estate thereby conveyed, such deed, though signed and sealed by the grantor only, must be taken to be the deed of both parties, and is not void for want of mutuality. *Caraway v. Caraway*, 7 Coldwn. (Tenn.) 245.

² Or if he have received the consideration therefor (*Hunter v. Watson*, 12 Cal. 363; but see *Martin v. Flowers*, 8 Leigh. (Va.) 158).—But the deed of a president of a corporation of lands in its name is inoperative (*Zoller v. Ide* (Neb.) 439); or of a husband for his wife, of a homestead property. *Eli v. Gridley*, 27 Id. 376.

too, he sends forth a deed as a valid deed, and induces others to act upon the representation, he is estopped from afterwards setting up the invalidity of the instrument, and showing that it was a simple nullity. (*o*) Where property is assigned by deed to a trustee who covenants with the assignor, the assignor has no equity to proceed against the *cestui que trust*. (*p*)

40. *Covenants in feigned names.—Estoppel.*—Generally speaking, the name of the covenantor or obligor appears in the body of the deed; but there is a sufficient designation and description of the party to be charged if the name is written at the foot of the instrument. (*q*) A man may bind himself by deed either in his own name, or by some acquired or adopted name, title, or description. Where, therefore, the defendant described himself in a deed by the name of "Davis and Marsh," he was held estopped from showing that his name was Davis only. (*r*)¹ So, if a man executes a bond in the name of Thomas, he is estopped by the bond from pleading that his name is Joseph.² If he is described as James in the body of the

(*o*) *Sheff. Asht. &c., Rail. Co. v. Woodcock*, 2 Rail. Cas. 522.

(*p*) *Pickering's Claim*, L. R., 6 Ch. 525.

(*q*) *Nurse v. Frampton*, 1 Ld. Raym. 28: 1 Salk. 214. 4 Ed. 2 cited Cro. Eliz. 57.

(*r*) *Elliott v. Davis*, 2 B. & P. 359.

¹ See *Beaman v. Whitney*, 20 Me. 413; which held that a deed to a partnership in the company name, in which only the surnames of a part of the company are mentioned, they being well-known members, can not take as grantees, those named can and will hold in trust for themselves and their associates.

² If there is a variance between the names of the grantors as they appear in the body of the deed and in the signatures, the identity of the persons will be presumed until rebutted, where the deed has been properly acknowledged (*Lyon v. Cain*, 36 Ill. 362). As to proper Christian names, the law knows but one, the omission or insertion of a middle name is immaterial, and the party may show that he is as well known

deed, and executes it in the name of John, by writing that name against the seal, and is sued in the name of John, and pleads the misnomer, the plaintiff may rely on the estoppel, and the deed is conclusive evidence of the adoption by the defendant of the names both of James and John. (s) If the defendant has not sealed and delivered the deed with his own hand, it must be made out that he is a party to it in point of law, by showing that the party who sealed and delivered the deed in his name was authorized so to do by a power of attorney or written authority under seal.

41. *Covenants and obligations by one person on behalf of another.*—If an individual in a private capacity, not acting on behalf of the government, covenants in his own name for the act of another, he is personally bound by his covenant, although he describes himself in the deed as covenanting “for and on the part and behalf” of such other person.¹ But,

(s) *Gould v. Barnes*, 3 Taunt. 505. *bread*, 11 C. B. 406. *Reeves v. Slater*, 7 B. & C. 489. *Williams v. Bryant*, 5 M. & W. 454.
Lind v. Hook, Mod. cas. 225, cited
Cro. Eliz. 897, n. (a). *James v. Whit-*

without as with a middle name (*James v. Stiles*, 14 Pet. 322; *McDonald v. Morgan*, 27 Tex. 503; *Dunn v. Games*, 1 McLean, 321). Where the description of a party in the deed suits two or more persons, it is incumbent upon the one claiming to show that he is the party intended (*Grand Gulf R. R., &c. Co. v. Bryan*, 16 Miss. (8 Sured. & M.) 234). Parol evidence is admissible to prove that a grantor executed the deed by another than his true Christian name. *Nixon v. Cobleigh*, 52 Ill 387.

¹ *Banks v. Sharp*, 6 J. J. Marsh. (Ky.) 180; *Davenport v. Sleight*, 2 Dev. & B. (N. C.) S. 381; *Martin v. Flowers*, 8 Leigh 158. To constitute a deed executed by an agent the deed of the principal, he and not the agent must appear, from the body of the deed, to be the grantor, and the deed must be signed with his name, and purport to be sealed with his seal (*Carter v. Chandron*, 21 Ala. 72; *State v. Jennings*, 5 Ark. 428; *Parmer v. Respass*, 5 T. B. Mon. (Ky.) 562; *Elwell v. Shaw*, 16

when upon the face of the contract it appears that the covenantor is an officer acting in a public capacity in discharge of his duty to the crown or the country, he is not personally liable for the fulfillment of the contract, unless he gives his own undertaking, and it plainly appears to have been the intention of the contracting parties that he should himself be responsible for the performance of the act covenanted to be done. (1)¹

42. *Joint and several agreements and promises.*—Where a defendant, a surveyor of highways, had incurred legal expenses on behalf of a parish, which were objected to, and opposition threatened to his accounts before the vestry, and the defendant at the meeting of the vestry offered to pay £50 of those expenses if the opposition was withdrawn, and the plaintiff and the other vestrymen present accepted the offer and signed a minute to that effect, and withdrew the opposition, and suffered the accounts to be passed, and the plaintiff, who was appointed successor to the defendant in the office of surveyor, sued the defendant, for the £50, it was held that he had no claim to the money, as the

(1) Wake v. Harrop, 30 L. J., Ex. 674. Allen v. Waldegrave, 2 Moore, 273. Unwin v. Wolseley, 1 T. R. 128.

Mass. 42; Fowler v. Shearer, 7 Id. 14; Prior v. Coulton, 1 Bailey (S. C.) 517; Burger v. Miller, 4 Wash. 280; Reamond v. Coffin, 2 Dev. (N. C.) Eq. 437, where the execution of a deed was as follows: "H for himself, and as attorney for A, held that such execution bound H personally, and that the court would enforce its specific performance against the heirs of A. Vanada v. Hopkins, 1 J. J. Marsh. (Ky.) 285.

¹ So a sheriff may make a deed (Webster v. Brown, 2 S. C. 428). In New Hampshire lands belonging to a town may be conveyed by a deed in the name of a duly authorized agent (Cofran v. Cockran, 5 N. H. 458); or where the legislature gives authority to an agent to convey lands, the conveyance may be in his name.

contract was with all the vestrymen present at the meeting, and not with the plaintiff alone. (u)¹

If there be a joint retainer and employment of another by divers persons to do one thing for the

(u) *Kilham v. Collier*, 21 L. J., Q. B. 65. *Lucas v. Beale*, 20 Id. C. P. 134.

¹ But it is a general rule, not of the law, but of the construction of contracts, that the interest of the parties will govern, in these cases where there is more than one party on either side. If the terms of the contract are joint and the interest several, the contract will be construed to be several, and *vice versa* (*Trustees v. Letcher*, 1 Mon. 11; *James v. Emery*, 5 Price, 529; *Cathedral v. Brown*, 3 Leigh, 98; *Ludlow v. McCrea*, 1 Wend. 228); but if the terms are so express that there is no ambiguity that will justify a court in attempting a construction, the express terms will govern to the exclusion of the interest (see *Hall v. Leigh*, 8 Cranch, 50; *Dod v. Halsey*, 16 Johns. 34; *Tapscott v. Williams*, 10 Ohio, 442; *Duvall v. Craig*, 2 Wheat. 45; *Wiggin v. Wiggin*, 43 N. H. 561; *Miller v. Reed*, 3 Grant, 51; *St. Louis, &c. v. Coultas*, 33 Ill. 188; *Spencer v. Durant*, Comb. 115; *People v. Evans*, 29 Cal. 429; *Grim v. School*, 51 Pa. St. 219). The Indiana statute does not change the common-law rule, that the obligee in a joint and several bond may sue one or all of the obligors (*State v. Bennett*, 24 Ind. 383); and see as to actions under the Mississippi code (*Vaughn v. Haden*, 37 Miss. 178). Where A, B, C, and D, fiddlers, agreed by deed to play together for their joint profit, and not to play apart, it was held that A, B, and C might maintain an action against D for playing alone at a tavern for his own benefit (*Spencer v. Durant*, Comb. 115; and see *Ewing v. Reilly*, 34 Miss. 113; *Quisenberry v. Artis*, 1 Dur. 30; *Whalen v. LaCrosse*, 16 Wis. 271; *Steele v. Furber*, 37 Miss. 71; *Johnson v. Blydenburgh*, 31 N. Y. 427; *St. Clair v. Williams*, 7 Ohio, 110; *Duvall v. Craig*, 2 Wheat. 45; *Carleton v. Tyler*, 4 Shep. 392; *Astor v. Miller*, 2 Paige, 68; *Armstrong v. Wheeler*, 9 Cow. 88; *Montague v. Smith*, 13 Mass. 396; *Fisher v. Ellis*, 3 Pick. 322; *Spencer v. Field*, 10 Wend. 87; *Gray v. Johnson*, 14 N. H. 414; *Kittredge v. Sumner*, 11 Pick. 50; *Beaumont v. Crane*, 14 Mass. 400; *Damainville v. Mann*, 32 N. Y. 197; *Theological Institution v. Barbour*, 4 Gray, 329; *Cox v. Walker*, 26 Me. 504; *Magee v. Fisher*, 8 Ala. 320; *Kingsley v. School*, 2 Barr. 28; *Kendall v. Carland*, 5 Cush. 74; *Hurlbut v. Post*, 1 Bosw. 28; *Wall v. Hinds*, 4

benefit of all, they have a joint legal interest in the fulfillment of the contract by the party employed, although they may have several beneficial interests, and be possessed of separate shares, in the subject-matter of the contract; but, if there be a separate retainer by each, in respect of the separate share of each, then they have separate interests in the fulfillment of the contract. (v)¹

If, in consideration of certain services to be rendered by the promisees, a promise is made to pay them a sum of money, this is a joint promise in favor of all, in which all are jointly interested; and the pointing out the particular share that each is to receive of the sum so promised to be paid will not create a severance of interest. But, if one sum in solido is not to be paid in the first instance, and afterwards divided, but separate and independent payments are to be made to each, then their interests are separate. (x)²

43. *Of joint and separate interests in deeds.*—If parties take a joint estate under a deed, and a covenant affecting the enjoyment of that estate is entered into with them and "each of them," the covenant is a joint covenant. If, on the other hand, the covenantees have separate estates and interests, then a separate duty arises to each one in respect of their several estates. (y)³

(v) *Hatsall v. Griffith*, 2 Cr. & M. 679. *Hill v. Tucker*, 1 Taunt. 7. *Emery*, 8 Taunt. 245; 2 Moore, 195. *Foley v. Adenbrooke*, 4 Q. B. 207. *Ivans v. Draper*, 1 Roll. Abr. 31, pl. 9. *Hopkinson v. Lee*, 6 Id. 964. *Wakefield v. Brown*, 9 Id. 209. *Pugh v.*

(x) *Thomas v. —*, Styles, 461.

(y) *Slingsby's case*, 5 Co. 18 d. *Stringfield*, 27 L. J., C. P. 34. *Had- don v. Ayres*, 28 L. J., Q. B. 105.

Gray, 256; *Montague v. Smith*, 13 Mass. 396; *Halsey v. Whitney*, 4 Id. 226; *Hollingsworths v. Dunbar*, 3 Munf. 168; *Philadelphia v. Reeves*, 48 Pa. St. 472).

¹ Id.

² Id.

³ A distinction is, however, to be taken between covenants

If a covenant to do a particular act be entered into with several persons generally, as "with A, B, and C," they have all *prima facie* a joint interest in the performance of it. (2) If a covenant is entered into with divers persons to keep a certain sea-wall in repair, this is, *prima facie*, a joint covenant; but, if it appears on the face of the deed that the covenantees are so many separate landowners, possessed of separate estates, the covenant shall be construed to be a several covenant, by reason of their several interests.

If any one of several partners or joint adventurers enters into a contract or stipulation with the rest, such as an engagement not to trade on his own account, or not to sell merchandise without the assent of the others, &c., this is a joint contract; for they have a joint interest in the performance of it, and the breach operates as a joint damage to all. A covenant with several persons for the payment to them of a sum of money is a joint covenant with all, in the performance of which they have a joint interest; and the pointing out of the share which each is to take of the entire amount will not create a separation of interests; (a) but, if a covenant be made with ten persons to pay a distinct sum of money to each of them, a separate duty

(2) *Sorsbie v. Park*, 12 *Ad. & W.* 156, *James*, 10 *B. & C.* 410; 5 *M. & R.* 158. *Bradburne v. Botfield*, 14 *Id.* 299.
 573. *Keightley v. Watson*, 3 *Exch.* (a) *Lane v. Drinkwater*, 1 *C. M. & R.* 599. *Byrne v. Fitzhugh*, *Id.* 613, *n.*
 725. *Wetherell v. Langston*, 17 *L. J.* *Ex.* 341; 1 *Exch.* 634. *Servante v.* (a) *English v. Blundell*, 8 *C. & P.* 332.

and covenantees, for, although a covenant may, by express words, be made both joint and several as to covenantors, notwithstanding the severalty of the interests, it would not be so as to covenantees. If, therefore, a joint and several covenant be made by covenantors, they would be severally liable if the interests were severable. But the same covenant can not be both joint and several as to covenantees (*Story on Contracts*, § 54).

arises to each; and it is the same in contemplation of law as if a separate and distinct contract had been entered into with each one of the parties separately. (*b*)¹

44. *Rights of tenants in common.*—If two tenants in common make a lease, reserving one entire rent to themselves, they have a joint interest in the rent, although it is reserved to them “according to their several and respective rights and interests:” but, if there are several demises, and a separate reservation of rent to each tenant in common, they have separate interests. (*c*) When an estate in land, with covenants annexed, comes to two persons as tenants in common, their interests are in certain cases joint or several at their election. (*d*) If, after a joint demise by tenants in common with a general reservation of one entire rent, one tenant in common dies, the rent is severable, and follows the separate reversions, so that the heir at law of the deceased tenant in common is entitled to one moiety of the rent, and may maintain an action against the surviving tenant in common, for receiving more than his share. (*e*) A covenant to repair in a joint demise by tenants in common runs with the entire reversion; and all the tenants in common of the reversion at the time of the breach, or their representatives, are jointly interested in it. (*f*)²

45. *Rights of joint tenants.*—If two joint tenants make a lease of their land, reserving rent to one of them, it shall enure to both in respect to the joint

(*b*) Withers *v.* Bireham, 3 B. & C. 254. Shaw *v.* Sherwood, Cro. Eliz. 729.

(*c*) Powis *v.* Smith, 5 B. & Ald. 850. Last *v.* Dinn, 28 L. J., Ex. 95. Wilkin-
son *v.* Hall, 1 Scott, 675.

(*d*) Midgeley *v.* Lovelace, Carth. 289. Kitchen *v.* Buckley, 1 Lev. 109. Womersley, *v.* Dally, 26 L. J., Ex. 219.

(*e*) Beer *v.* Beer, 12 C. B. 60.

(*f*) Thompson *v.* Hakewill, 19 C. B. N. S. 713; 35 L. J., C. P.

¹ See cases cited in note 1, p 79.

Id.

reversion; (*g*) and the same rule holds good with respect to parceners who have a unity of interest, title, and possession, and together constitute but one heir. (*h*)

46. *Joint and separate interests in the case of implied contracts and promises.*—In implied contracts and promises, if the consideration moves from several persons jointly, the law raises a corresponding implied promise in favor of all, in which all are jointly interested; but if there be several separate considerations moving from the parties separately and individually, the law implies a separate promise in favor of each, and their interests are separate (*i*)¹ A carrier being in want of assistance upon the road, engaged two persons separately to aid him with their horses. Each sent three horses, with a carter to attend them, and the six drew the wagon; and they were directed to send in their several accounts. The two brought a joint action for the hire; but it was held not to be maintainable, as they had no joint interest. (*k*) If several persons agree to make a joint purchase, and employ an agent to buy merchandise on their joint account, and the agent goes into the market and makes the purchase in his own name, and the vendor neglects to fulfill the contract, the employers of the agent are jointly interested in the contract made by their agent; (*l*) and, if goods and chattels are deposited by several joint owners in the hands of a bailee,

(*g*) Co. Litt. 214 a, 180 b.

Story v. Richardson, 6 Bing. N. C.

(*h*) Decharms v. Horwood, 4 M. &

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Sc. 400.

(*k*) Smith v. Hunt, 2 Chit. 142.

(*i*) Coleman v. Sherwin, 1 Salk. 137.

(*l*) Cothay v. Fennell, 10 B. & C. 672.

¹ Townsend v. Hubbard, 4 Hill, 351; Van Alstyne v. Van Slyck, 10 Barb. 387; How v. How, 1 N. H. 49; Copeland v. Mercantile Ins. Co. 6 Pick. 198; New England, &c. Ins. Co. v. De Wolf, 8 Pick. 61; Hull v. Leigh, 8 Cranch. 50.

they are not claimable by one of them alone ; and money paid into a bank, to the joint account of several persons, can not be drawn out by one of them alone ; but, if several joint owners of a sum of money allow one of them to deal with their money and place it in the hands of a banker to his separate account, the banker may treat that as a contract with the one individual dealing with him, and refuse to be accountable to the joint owners of the money.

If a sum of money in *solido* is advanced by several persons, the law raises an implied joint promise of repayment in favor of all ; but, if several sums be advanced separately by each, the law implies a corresponding separate promise in favor of each. (*m*) Two joint owners of a sum of money, traveling together on the highway, were robbed of the money ; and thereupon they brought a joint action against the hundred, when it was objected that they ought to have sued separately ; but the court held that they were properly joined, because they were jointly entitled to the damages to be recovered. If, however, there had been several sums of money, the separate property of the parties robbed, then separate actions should have been brought. (*n*) A, B, and C, being assignees under a commission of bankruptcy, incurred legal expenses on account of the bankruptcy to the amount of £208. A and B each paid the sum of £104 in discharge of the solicitor's bill, and brought a joint action against C, upon an implied promise for contribution, when it was held that they could not sue jointly, but must each bring a separate action, as the law would imply a separate promise in favor of each, in respect of the money

(*m*) *Osborne v. Harper*, 5 East, 225.
Driver v. Burton 21 L. J., Q.B. 157.

(*n*) *Winterstoke, &c., v. Dyer*, 370, a,
 pl. 59.

which each had paid on account of C. (o) But, although several persons may contribute severally in equal shares towards one entire amount, yet, if their several contributions are put together and advanced as one sum in solido, the implied promise of re-payment is a joint promise to all, in respect of the entire sum so advanced, and not a several promise to each in respect of their several contributions thereto. (p) If several persons contribute their several proportions of a sum of money which is to be paid under a special contract to which they are parties, and the money is advanced as a sum in solido, and the contract is afterwards abandoned or rescinded, the implied promise to refund the money arises in favor of all. (q)

47. *Of joint and several liabilities ex contractu.*—“Each party to a joint contract,” observes Parke, B., “is severally liable in one sense; *i.e.*, if sued severally, and he does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all and the several bonds of each of the obligors.” (r) It may be laid down as a general rule that, wherever several persons agree to perform a particular act, they are bound jointly and not severally in the absence of express words creating a several liability. If two or more persons covenant generally for themselves, without any words of severance, or that they, or one of them, shall do a particular act, a joint charge is

(o) *Brand v. Boulcot*, 3 B. & P. 235.

(p) *May v. May*, 1 C. & P. 44.

(q) *English v. Blundell*, 8 C. & P. 332.

(r) *King v. Hoare*, 13 M. & W. 505. *Addison v. Gibson*, 10 Q. B. 106; 16 L. J., Q. B. 165. *Gross v. Williams*, 7 H. & N. 675; 31 L. J., Ex. 145.

created. (s) If three are bound in a bond by these words: "We bind ourselves, and each of us jointly," it is a joint obligation; for the word "jointly," makes the obligation joint, which the word "each" can not make, several. Any number of persons may bind themselves jointly for the performance of one entire duty, and so become sureties for one another for the performance of the thing contracted to be done. (t) If several persons sign a promissory note commencing, "We promise to pay," &c., each is liable for the other, and all are liable for the full amount of the note. (u)

If two or more persons, who have joined together in a contract, "covenant severally," or become "severally bound," it is (in the absence of express words implying a joint liability) the same as if each of the covenantors had executed a separate bond on the same parchment. (x) When the parties engage for the performance of distinct and several duties, mere words of plurality, such as "we bind ourselves," will not make the contract joint. (y) Where two persons guaranteed the due payment of an acceptance for £400 "in the proportion of £200 each," it was held that a several liability only was clearly expressed. (z)

If A lets land to B and C, and they covenant jointly and severally with the lessor to pay the rent, or the like, they are sureties for each other for the due performance of the contract; and it is as competent for each of them to covenant for the other as it is for a stranger to covenant for both, which is a common thing. (a) A covenant by two or more persons

(s) Bacon's Abr. tit. Obligations.

(t) 1 Saund. 291 b, n. 4.

(u) Manley v. Boycott, 2 Ell. & Bl. 46.

(x) Newton v. Blunt, 3 C. B. 681.
Beaumont v. Greathead, 2 C. B. 494.

(y, Collins v. Prosser, 1 B. & C. 682.

(z) Fell v. Goslin, 7 Exch. 185;
21 L. J., Ex. 145.

(a) Enys v. Donnithorn, 2 Bur. 1190
1 Wms. Saund. 154, n. 1.

"for ourselves and each of us," or "for ourselves and every of us," is a joint and several covenant. (*b*) It has been held that, where the lessees in the first covenant of a lease "covenant jointly and severally in manner following," the joint and several lien extends to all the subsequent covenants, in the absence of any express words manifesting an intention to the contrary. (*c*) If several persons enter into a joint bond or promissory note, or other contract, and in the obligatory part make use of the pronoun I instead of we, they are jointly and severally bound. (*d*)

Where three persons agreed to refer certain disputes between them to arbitration, and "jointly and severally" promised and agreed to perform the award, and the arbitrator awarded that two of them should pay a sum of money to a third, and settled and directed the amount that was to be paid by each, it was held that each was liable for the whole amount awarded, as well as for his individual share. (*e*)¹ If a party of friends dine together at a tavern, they are jointly and severally liable for the entire cost of the entertainment, in the absence of circumstances showing an express intention to the contrary.* No certain rule of law, however, can be laid down to regulate the joint or several liability upon implied contracts, as the right of action entirely depends upon the varying facts of each particular case, and the inference a jury may be disposed to draw from them. In a case where pro-

(*b*) *May v. Woodward*, 1 Freem. 248.
Bolton v. Lee, 2 Lev. 56.

(*c*) *Duke of Northumberland v. Er-*
lington, 5 T. R. 522.

(*d*) *Sayer v. Chaytor*, 1 Lutw. 696.

Clerk v. Blackstock, Holt, N. P. C.
474. *Hall v. Smith*, 1 B. & C. 409. Ex
parte *Buckley*, 14 M. & W. 469.

(*e*) *Mansell v. Burredge*, 7 T. R.

352.

¹ *Morse on Arbitration and Award*, 579, 584; and case cited.

* But see *Tilleston v. Nettleton*, 6 Pick. 509.

visions were furnished for the use of the officers of a regimental mess in camp, Lord Kenyon seems to have thought that the officers were severally liable, only in respect of the articles used and consumed by each. (*f*)

48. *Joint and several purchasers*.—If two persons join in giving an order for an individual parcel of goods, they are jointly liable for the price of them, unless it be proved that there was a separate contract with each. (*g*) If they employ an agent to make the purchase, and he purchases an individual quantity, they are jointly and severally responsible for the price. (*h*) But, if there be no agency in the matter, and the purchaser of an undivided parcel of goods subsequently makes a sub-contract with other parties for the taking by them of particular shares in his purchase, this sub-division of his beneficial interest under the original contract does not render the persons claiming under him jointly responsible with himself for the performance of the original contract. (*i*)

49. *Contracts with agents*.—*Rights of the principal*.—If the agent who makes the contract contracts only in the name of the principal, intending to bind the latter, and not himself, by the contract, he will have no right of action upon it in his own name, unless he has himself an interest in the contract.¹

(*f*) *Forster v. Taylor*, 3 Campb. 49.
Rolle's Abr. 24, 31.

(*h*) *Gouthwaite v. Duckworth*, 12 East, 426.

(*g*) *Gibson v. Lupton*, 2 M. & Sc. 371.

(*i*) *Coo, e r Eyre*, 1 H. Bl. 37.

¹ *Gilmore v. Pope*, 5 Mass. 491; *Taunton, &c. Turnpike v. Whiting*, 10 Mass. 327, 336; *Garland v. Reynolds*, 2 Appleton, 45; *Irish v. Webster*, 2 Greenl. 171; *Taintor v. Prendergast*, 3 Hill, 72; *Gunn v. Cantine*, 10 Johns. 387. A factor against whom a judgment had been rendered, in favor of the consignor of goods, sold by him for their price, held, to be thereby estopped from afterwards suing the consignor for expenses, freight, advances, and commissions upon the sales thereof *McCroskey v. Mabry*, 45 Ga. 327.

Where certain tolls vested in a body of commissioners were let to the defendant, under a memorandum which stipulated that the rent was to be paid to the treasurer of the commissioners at his house in Ely, it was held that the contract was with the commissioners—to pay them through the medium of their officer—and that they alone could sustain an action upon it. (*k*) So, where several persons rented a building to be used as a synagogue, and a treasurer was appointed annually by them, whose business it was to let seats and receive the rents for the use of the lessees, it was held, in an action brought by the treasurer for rent due in respect of the seats so let, that the contracts for the occupation of the seats, though in fact made with the treasurer, were, in point of law, made with the lessees who had the title to the synagogue, and that they, and not their servant, the treasurer, were the proper parties to maintain the action. (*l*)

50. *Principals contracting as agents.*—If a party describes himself on the face of a written contract as agent, but does not disclose who his principal is, he may repudiate the agency and claim the benefit of the contract as the principal, if he is in reality the principal.¹ Although a man can not, in strict propriety of speech, be agent to himself, yet in a contract of charter-party he may reserve to himself the right to fill either or both of those characters at his election; he may contract as agent of the freighter, whoever that freighter may turn

(*k*) *Pigott v. Thompson*, 3 B. & P. 147. *Bowen v. Morris*, 2 Taunt. 374.

(*l*) *Israel v. Simmons*, 2 Stark. 356. *Seignior and Wolmer's case*, Godb. 360.

¹ See *Allen v. Coit*, 6 Hill, 318; *Rogers v. Coit*, Id. 322. *Winchester v. Howard*, 97 Mass. 303; *Huntington v. Knox*, 7 Cush. 371.

out to be, and may then, if he pleases, adopt that character himself. (*m*)

51. Concealment of agency.—Rights of undisclosed principals.—If there is nothing on the face of a written contract to indicate agency, but one of the contracting parties is in reality an agent contracting on behalf of an unknown and undisclosed principal, the latter may in general, at any subsequent period, so long as the contract remains executory, come forward and claim the benefit of it; but he is, of course, bound by all the equities raised by his agent whilst dealing apparently as a principal, and can take such rights of action only as the latter possesses at the time that he, the principal, discloses himself. (*n*) This right of the principal to disclose his real character, and require the fulfillment of the contract with himself personally, exists even in the case of factors who have sold goods for the principal in their own names under a *del credere* commission, provided the general balance of accounts between the principal and the factor is at the time in favor of the former. (*o*)¹ And no rule or custom of the Stock Exchange can alter the law in this respect or in anywise control the legal rights of the principal, although the principal was cognizant of the rule at the

(*m*) *Schnaltz v. Avery*, 16 Q. B. 663; *Norwood*, 14 C. B., N. S. 574; 17 20 L. J., Q. B. 231. Id. 466.

(*n*) *Risbourg v. Bruckner*, 28 L. J., C. P. 94. *Carr v. Hinchcliff*, 4 B. & C. 547. *Fish v. Kempton*, 7 C. B. 692. *Phelps v. Prothero*, 16 C. B. 370; 24 L. J., C. P. 225. *Semenza v. Brinsley*, 18 C. B., N. S. 467. *Dresser v.* (*o*) *Bonzi v. Stewart*, 5 Sc. N. R. 1. *Scrimshire v. Alderton*, 2 Str. 1182. *Escot v. Milward*, 1 Esp. N. P. 108. *Hornby v. Lacy*, 6 M. & S. 166. *Drinkwater v. Goodwin*, 1 Cowp. 255. *Hudson v. Granger*, 5 B. & Ald. 27.

¹ And see generally *Porter v. Talcott*, 1 Cow. 359; *Cheever v. Smith*, 15 Johns. 276; *Clealand v. Walker*, 11 Ala. 1058; *Hyde v. Paige*, 9 Barb. 150; *French v. Price*, 24 Pick. 13; *Filter v. Commonwealth*, 31 Pa. St. 406; *Johnson v. Cleaves*, 14 N. H. 332.

time he employed the broker. (p) Inasmuch, however, as the factor has a lien on the price of the goods in the hands of the buyer to the extent of the balance due to him from the principal on the general account, his commission on the sale, moneys advanced, &c., he may insist on payment from the buyer to himself in opposition to the principal, to the extent of the moneys so due to him from the latter.

In the case of a contract for the sale of land, specific performance has been decreed, although the purchaser was a mere nominal contractor, purchasing on behalf of, or in trust for, an unknown and undisclosed principal. (q) As soon as a purchaser dealing with an unknown agent discovers that he is an agent, and receives an intimation from the principal that the latter intends to look to him for payment, he is not afterwards justified in settling with the agent. (r) The undisclosed principal, who comes forward to adopt the contract, must adopt it in omnibus; and, if it is coupled with an agreement giving the defendant certain rights as against the agent, the principal must take the contract subject to those rights. (s)

In certain cases, however, where a contracting party professes to be a principal in the transaction, those who have contracted with him as a principal may refuse to fulfill the contract with any other person than the party with whom they have contracted as a principal. Where, for example, on the face of a charter-party for the hire of a vessel, one of two contracting parties was described as the owner of the vessel, and contracted with the other party in that character, it was held that

(p) *Humphrey v. Lucas*, 2 C. & K. 152.(q) *Hall v. Warren*, 9 Ves. 605.(r) *Cornish v. Abington*, 4 H. & N.

557; 28 L. J., Ex. 262.

(s) *Ramizotti v. Bowring*, 7 C.

B., N. S. 856; 29 L. J., C. P.

30.

a third person could not come forward and claim the benefit of the contract on the ground that he was himself the principal and owner of the vessel, and that the person described on the face of the contract as owner was not, in truth, the owner, but his agent. The inducement to the one party to enter into the contract may have been the character, credit, and substance, of the other party described as the principal; and the former has a right, therefore, to decline performance of the contract with any other person. (t) So, in the case of a contract for the sale of land, if it appears that the agent treating for the land contracted as a principal in the transaction, and that the agency was designedly concealed because it was known that the vendor, from personal considerations, would not have sold the land to the undisclosed principal, and the vendor has consequently been deceived, the principal can not come forward and enforce the contract so obtained.¹

So, where a merchant, residing in England, orders goods for a foreigner, the usage of trade is that the credit is given to the home agent, who has apparently contracted as the principal, and that the foreigner is not bound by, and consequently can not enforce, the contract. (u)

To entitle a person to enforce a contract, it must be shown that he himself made it, or that it was made on his behalf by an agent authorized to act for him at

(t) *Humble v. Hunter*, 12 Q. B. 310; *v. Claye*, L. R., 8 Q. B. 313. *Armstrong v. Stokes*, L. R., 7 Q. B. 605.

(u) *Die Elbinger Actien-Gesellschaft* *Hutton v. Bullock*, L. R., 8 Q. B. 331.

¹ See generally as to ratification in such and like cases, *Collin v. Butts*, 10 Wend. 399; *Lucas v. Barrett*, 1 Green (Iowa) 511; *Ballou v. Talbot*, 16 Mass. 461; *Rossiter v. Rossiter*, 8 Wend. 494; *Palmer v. Stephens*, 1 Den. 472; *Thomas v. Atkinson*, 38 Ind. 248.

the time, or whose act has been subsequently ratified and adopted by him; and the person for whom the agent professes to act must be capable of being ascertained at the time. (x) A subsequent ratification, however, may be valid, although the principal was ignorant of the transaction until after it took place; and such a ratification may be made after an action has been commenced upon the contract in the name of the principal. (y)¹

52. *Proof of agency where the contract is in writing.*—When the contract is in writing, and the agency is concealed, so that the agent appears on the face of the contract to be the contracting party, and no mention is made of any principal, it has been contended that the admission of oral evidence, to show that the party with whom the contract is so made is

(x) *Watson v. Swann*, 11 C. B. N. S. 756; 31 L. J. C. P. 210.

(y) *Ancona v. Marks*, 7 H. & N. 686; 31 L. J. Ex. 163.

¹ A ratification by a principal, however, can only be effectual between the parties, when the act is done by the agent avowedly for or on account of the principal. Story on Cont. § 251 a. And see as to ratification generally, *Chapman v. Lee*, 47 Ala. 143; *Meehan v. Forrester*, 52 N. Y. 277; *Hazard v. Speers*, 2 Abb. (N. Y.) App. Dec. 353; *Frank v. Jenkins*, 22 Ohio St. 597; *Kelsey v. National Bank, &c.*, 69 Pa. St. 426; *Lewis v. Ingersoll*, 3 Abb. (N. Y.) App. Dec. 55; *Gulick v. Grover*, 33 N. J. L. (44 Vroom.) 463; *Drakeley v. Gregg*, 8 Wall. 242; *Vincent v. Rather*, 31 Tex. 77; *Stoddard's Case*, 4 Ct. of Cl. 511; *Fowler v. Pearce*, 49 Ill. 59; *Ridenour v. Wherriitt*, 30 Ind. 485; *Williams v. Storm*, 6 Coldw. 485; *Hammond v. Hannin*, 21 Mich. 374; *Wright v. Burbank*, 64 Pa. St. 247; *Baldwin v. Burrows*, 47 N. Y. 199; *Grant v. Beard*, 50 N. H. 139; *Krider v. Western College*, 31 Iowa, 547; *Partridge v. White*, 569 Me. 564; *Reynolds v. Davison*, 34 Md. 662; *Hawkins v. Baker*, 46 N. Y. 666; *Rowan v. Hyatt*, 45 N. Y. 138; *Bassett v. Brown*, 105 Mass. 551; *Lester v. Kinne*, 37 Conn. 9; *Murray v. Walter*, 44 Ga. 58; *Ketchum v. Verdell*, 42 Id. 534; *Stainsby v. Frazer's &c. Co.*, 3 Daly. (N. Y.) 98.

in reality only an agent, infringes the well-known rule of law that the terms of a written contract cannot be varied, or contradicted, or added to, by oral testimony, inasmuch as it is offered to introduce a party to the contract other than the one in whose name it is expressed to be made. But it has been held that the evidence amounts merely to an explanation of the real character of the transaction, and does not in any degree contradict or qualify the provisions and stipulations of the contract itself; and, whilst "it is clear that parol evidence to vary a written contract cannot be received, yet that the parties contracted in the capacities of principals or agents, may be explained." (z)¹ In all.

(s) *Humfrey v. Dale*, 26 L. J. Q. B. 137; 27 Id. 395.

¹ *Holtsinger v. National, &c. Bank*, 37 How. Pr. 203; and see *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 32; *Kean v. Davis*, Spencer, 426; *Williams v. Cochrane*, 7 Rich. 45; *Hartford, &c. Ins. Co. v. Wilcox*, 57 Ill. 18c; *Mannella v. Barry*, 3 Cranch. 415. The general rule that parol evidence is not admissible to vary written contracts, has been variously stated and applied in the United States; see generally *Huse v. McQuade*, 52 Mo. 399; *Clark v. N. Y. Life Ins. Co.*, 7 Lans. (N. Y.) 323; *Weaver v. Fletcher*, 27 Ark. 510; *Basshor v. Forbes*, 36 Md. 154; *Arberter v. Day*, 39 Conn. 155; *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180; *Letcher v. Letcher* 50 Mo. 137; *Washington Ins. Co. v. St. Mary's Seminary*, 52 Id. 480; *Harris v. Rathbun*, 2 Abb. (N. Y.) App. Dec. 326; *Robertson v. Evans*, 3 S. C. 330; *Johnson v. Pollock*, 58 Ill. 181; *McClelland v. James*, 33 Iowa, 571; *Bell v. Woodman*, 60 Me. 463; *Allen v. Sowerby*, 37 Md. 410; *Bubbet v. Young*, 51 N. Y. 237; *Tatman v. Barrett*, 3 Houst. (Del.) 266; *Smith v. Dallas*, 35 Ind. 255; *Colt v. Cone*, 1c7 Mass. 285; *Cram v. Union Bank*, 1 Abb. (N. Y.) App. Dec. 461; *Jackson v. Jackson*, 47 Ga. 99; *Thomas v. Wolf*, 47 Id. 295; *Campbell v. Tate*, 7 Lans. 390; *Perry v. Hill*, 68 N. C. 417; *Coughenour v. Suhre*, 71 Pa. St. 462; *Davis v. Goodrich*, 45 Vt. 56; *Hill v. Payton*, 22 Gratt. (Va.) 550; *Cocks v. Barker*, 49 N. Y. 107; *Ball v. Benjamin*, 56 Ill. 105; *Calbreath v. Va. Porcelain, &c. Co.*, 22 Gratt. 697; *Armstrong v. Morrill*, 14 Wall. 120; *Altocheel v. San Francisco, &c., Association*, 43

cases where the character in which parties contract is not defined on the face of the writing, (a) "it is com-

(a) *Wilson v. Hart*, 1 *Moore*, 50.

Cal. 171; *Ward v. McNaughton*, *Id.* 159; *Taylor v. Holter*, 1 *Mon. T.* 688; *Purcell v. Burns*, 39 *Conn.* 429; *Borland v. Wolrath*, 33 *Iowa*, 130; *Wade v. Percy*, 24 *La. An.* 173; *Gerry v. Stimson*, 60 *Me.* 186; *Clarke v. Lancaster*, 36 *Md.* 196; *Horner v. Stillwell*, 35 *N. J. L.* 307; *Placher v. Strauss*, 47 *Miss.* 358; *Slosson v. Hall*, 17 *Minn.* 95; *Schreiber v. Osten*, 50 *Mo.* 513; *Miller v. McCoy*, 50 *Id.* 214; *Means v. De La Vergue*, *Id.* 343; *King v. Fink*, 51 *Id.* 205; *Donnell v. Humphreys*, 1 *Mon. T.* 518; *Baltes v. Ripp*, 1 *Abb. (N. Y.) App. Dec.* 78; *Mayor, &c. of N. Y. v. Brooklyn Fire Ins. Co.*, 3 *Id.* 251; *Same v. Exchange Fire Ins. Co.*, *Id.* 261; *Langdon v. Hughes*, 107 *Mass.* 272; *Commonwealth v. Moran*, *Id.* 239; *DeDermott v. Hoffman*, 70 *Pa. St.* 31; *Moore v. State*, 3 *Heisk. (Tenn.)* 493; *Ruckman v. Ransom*, 35 *N. J. L.* 565; *Grimes v. Harmon*, 35 *Ind.* 198; *McCray v. Lipp*, *Id.* 116; *Brower v. Bowers*, 1 *Abb. (N. Y.) App. Dec.* 214; *Campbell v. Johnson*, 44 *Mo.* 247; *Howlett v. Howlett*, 56 *Barb.* 467; *Willis v. Fernald*, 33 *N. J. L. (4 Vroom)* 206; *Thorington v. Smith*, 8 *Wall.* 1, 12; *Lancey v. Phoenix, &c. Ins. Co.*, 56 *Me.* 562; *Stoops v. Smith*, 100 *Mass.* 63; *Vanderkan v. Thompson*, 19 *Mich.* 82; *Bonney v. Morrill*, 57 *Me.* 368; *Willis v. Kern*, 21 *La. An.* 749; *Caldwell v. Layton*, 44 *Mo.* 220; *Tobey v. Leonard*, 2 *Cliff.* 40; *Dorham v. Gill*, 48 *Ill.* 151; *Finney's Appeal*, 59 *Pa. St.* 398; *Richmond, &c. R. R. Co. v. Sneed*, 19 *Gratt.* 354; *Orton v. Harvey*, 23 *Wis.* 99; *Bancroft v. Grover*, 23 *Wis.* 463; *Kerr v. Kuykindall*, 44 *Miss.* 137; *Arthur v. Roberts*, 60 *Barb.* 580; *Waymack v. Heilman*, 26 *Ark.* 449; *Landman v. Ingram*, 49 *Mo.* 212; *Hubbel v. Ream*, 31 *Iowa*, 289; *Perry v. Smith*, 34 *Tex.* 277; *Field v. Munson*, 47 *N. Y.* 221; *Insurance Co. v. Thorp*, 22 *Mich.* 146; *Terrell v. Walker*, 66 *N. C.* 244; *Robinson v. United States*, 13 *Wall.* 363; *Wilmering v. McGaughey*, 30 *Iowa*, 205; *Goodrich v. Stevens*, 5 *Lans. (N. Y.)* 230; *Milton v. Hudson, &c. Steamboat Co.*, 4 *Lans.* 76; *Officer v. Howe*, 32 *Iowa*, 142; *Monroe v. Behrens*, 67 *Pa. St.* 459; *Sawyer v. Vories*, 44 *Ga.* 662; *Beers v. Beers*, 22 *Mich.* 42; *Morrall v. Waterson*, 7 *Kans.* 199; *Proctor v. Gilson*, 49 *N. H.* 62; *Westbrooks v. Jeffers*, 33 *Tex.* 86; *Buzzell v. Willard*, 44 *Vt.* 44; *Ingersoll v. Truebody*, 40 *Cal.* 603; *Booth v. Hynes*, 54 *Ill.* 363; *Dugger v. Taylor*, 46 *Ala.* 320; *Perkins v. Young*, 82 *Mass. (16 Gray)* 389; *Cocke v. Bailey*,

petent to show that one or both of the contracting parties were agents for other persons, and acted as such, in making the contract, so as to give the benefit of the contract to the unnamed principal, and this whether the agreement be or be not expressed in writing." (b) But, if the consideration moves from one only of the partners in a firm, such partner may sue alone; (c) and upon negotiable instruments, such as bills of exchange and promissory notes, none but

(b) Parke, B., *Higgins v. Senior*, 8 M. & W. 844. *Beckham v. Drake*, 9 M. & W. 91. *Wake v. Harrop*, 30 L. J. Ex. 273. *Bateman v. Phillips*, 15 East, 272. *Garrett v. Handley*, 3 B. & C. 462; 4 B. & C. 664; 5 D. & R. 319; 7 D. & R. 144. *Ruppell v. Roberts*, 4 N. & M. 31. *Cooke v. Farquhar*, 17 L. J. Ex. 289. *Spurr v. Cass*, L. R. 5 Q. B. 656; 39 L. J. Q. B. 249. (c) *Agacio v. Forbes*, 14 Moore, P. C. 171.

42 Miss. 81; *Kirk v. Hartman*, 63 Pa. St. 97; *Delano v. Goodwin*, 48 N. H. 203; *Ellis v. Crawford*, 39 Cal. 523; *Suffern v. Butler*, 21 N. J. Eq. 410; *De Wolf v. Crandall*, 1 Sweeney (N. Y.) 556; *Block v. Columbian Ins. Co.*, 42 N. Y. 393; *Richards v. Schlegelmich*, 65 N. C. 150; *Foster v. McGraw*, 64 Pa. St. 464; *Anthony v. Atkinson* 2 Sweeney (N. Y.) 228; *Leppoc v. National Union Bank*, 32 Md. 136; *Martin v. Clarke*, 8 R. I. 389; *Donley v. Tindall*, 32 Tex. 43; *Boyce v. Wilson*, 32 Md. 122; *McGuire v. Stevens*, 42 Miss. 724; *Wemple v. Knopf*, 15 Minn. 440; *Wright v. Smith*, 82 Mass. (16 Gray) 499; *Foster v. McGraw*, 64 Pa. St. 464; *Robinson v. McNeill*, 51 Ill. 225; *Warfield v. Booth*, 33 Md. 63; *Paul v. Owings*, 32 Md. 402; *McClennan v. Hall*, 33 Md. 203; *Coddington v. Goddard*, 82 Mass. (16 Gray) 436; *Pike v. Fay*, 101 Mass. 134; *Swett v. Shumway*, 102 Id. 365; *Nedvidek v. Meyer*, 46 Mo. 600; *King v. Ruckman*, 21 N. J. Eq. 599; *Lytle v. Bass*, 7 Coldw. 303; *Collins v. Gilson*, 29 Iowa, 61; *Haile v. Pierce*, 32 Md. 327. *Jackson v. Beling*, 22 La. An. 377; *Case v. Peters*, 20 Mich. 298; *Deery v. Cray*, 10 Wall. 263; *Draper v. Stanley*, 1 Heisk. (Tenn.) 432; *Pierce v. Brew*, 43 Vt. 292; *Hutton v. Arnett*, 51 Ill. 198; *Kimball v. Myers*, 21 Mich. 276; *Leonard v. Dunton*, 51 Ill. 482; *Elston v. Kennicott*, 52 Id. 272; *Hammond v. Hannin*, 21 Mich. 374; *Stockham v. Stockham*, 32 Md. 96; *Selby v. Friedlander*, 22 La. An. 381; *Cook v. Shearman*, 103 Mass. 21; *Eddy v. Wilson*, 43 Vt. 362; *Iron City, &c. College v. Kerr*, 3 Brews. (Pa.) 196.

the parties mentioned by their name or firm can be admitted to sue.

53. *Purchases in the name of one of several joint adventurers.*—If several persons send their cattle to a particular salesman, who sells them all to one individual, the only contract is the contract with the salesman alone, and each separate owner cannot bring an action against the purchaser for the price of his cattle. (*d*) But, if a number of persons agree to be jointly interested in a purchase, which is to be made by one of them separately, in his own name, and the contract is made accordingly, all may join in suing for a breach of it. (*e*)¹

54. *Recovery of the money of the principal paid away by the agent.*—If the money of the principal has been paid by the agent under circumstances which create a right to recover it back, as, for example, by mistake, or on the strength of a false or fraudulent representation, either the agent or the principal may bring an action for “money had and received,” and recover the money. (*f*) If the money of the principal is lent by the agent, the principal cannot maintain an action against the borrower to recover it back when the time of repayment arrives, unless it is proved that the principal was in reality the lender; for, if B lends money to A, and A makes a further loan of it to C. B has no right of action against C to recover it

(*d*) *Martin, B., Walshe v. Provan, Norfolk v. Worthy, 1 Campb. 337. 8 Exch. 852. Stevenson v. Mortimer, 2 Cowp. 805.*

(*e*) *Cothay v. Fennell, 10 B. & C. 671. Smith v. Sleaf, 12 M. & W. 585.*

(*f*) 1 Roll. Abr. 38, pl. 12. *Drop Bastable v. Poole, 1 C. M. & R. 410. v. Thaire, Latch. 126. Tracy v. Veal, Holt v. Ely, 1 Ell. & Bl. 795. Archer Cro. Jac. 223; Id. 224. Duke of v. Bank of England, 2 Doug. 637.*

¹ And see *Davis v. Boardman, 12 Mass. 80; Rutland, &c. R. R. Co. v. Cole, 24 Vt. 33; Bailey v. Onondaga Ins. Co., 6 Hill, 476; Bank of United States v. Lyman, 20 Vt. 66½.*

back. (*g*) Where a cargo belonging to several joint owners was sold by their agent, and the money realized by the sale was paid into a bank by such agent in his own name, it was held that the bankers were accountable only to the agent from whom they had received the money. (*h*)¹

55. Rights of principals upon deeds made by agents.—By an authority in writing, under seal, one man may authorize another to enter into, and to execute, contracts under seal in his behalf; (*i*) but it depends upon the express terms of such contracts, and upon the mode in which the power given to the agent is exercised, whether the contract, when made, is the contract of the principal or of the agent, or whether it is the contract of neither the one nor the other. If the principal has, by a written authority, sealed and delivered, authorized the agent to enter into and execute the deed, and the covenants contained in such deed are entered into with the principal, in express terms, and the agent merely executes the deed in the name of the principal (*k*), then the contract is the contract of the principal. If, on the other hand, the agent is made a party to the deed on behalf of the principal, and the covenants are entered into with the

(*g*) *Sims v. Bond*, 5 B. & Ad. 393. *Calland v. Lloyd*, 6 M. & W. 26. *Alexander v. Barker*, 2 Cr. & Jerv. 139. *Cooke v. Seeley*, 2 Exch. 746; 17 L. J. Ex. 288.

(*h*) *Sims v. Brittain*, 4 B. & Ad. 375. *Pinto v. Santos*, 5 Taunt. 447. *Martin*, B. 8 Exch. 852.

(*i*) *Com. Dig. C. 1, C. 5.* *Horsley*

v. Rush, cited 7 T. R. 209. *Harrison v. Jackson*, Id. 210.

(*k*) An agent who has an authority under seal to grant leases should merely execute the lease in the name of the principal. *Frontin v. Small*, 2 Raym. 1418. *Combe's case*, 9 Co. 76 b. *M'Ardle v. The Irish Iodine Co.*, 15 Ir. Com. L. R. 146.

¹ *United States v. Bartlett*, Davies, 9; *Elliott v. Swartwout*, 10 Pet. 137; *Lloyd's Paley on Agency*, 336, 337; *Story on Agency*, § 435.

agent as such, then the contract is the contract of the agent.¹

56. *Liability of undisclosed principals upon simple contracts.*—The extent and nature of the authority of an agent may be defined by writing, by oral instruction, or by the course of dealing between the parties

¹ And in the case of an authority coupled with an interest, that authority may be executed in the name of the agent, as in the case of masters of vessels (*The Gratitude*, 3 Rob. 257-263; the *Schooner Tilton*, 5 Mason, 481); and in such cases an authority to do more, always involves an authority to do more. Story on Agency, § 173.

² By the Roman law there was a species of oral commission called *mandatum*, or *mandate*, which was in the nature of a request from one friend to another, and therefore, although entirely gratuitous, was regulated by much stricter rules than mere agreements for hire and reward.—If anything were paid for the service (except by way of *honorarium* for professional service), the obligation lost its high rank and became merely an agreement for hire, governed by the ordinary rules of contracts. The mandate had a sacred origin in religion and in the relations of friendship. Any one was, of course, free to decline such a mandate, but once accepted, it bound the acceptor to the same diligence which a prudent person would use in the conduct of his own affairs, *sui juris*. "Once accepted, the mandate must be executed, or else renounced soon enough to permit the mandator to exercise it himself, or through another. So, unless the renunciation is made in such a way that the mandator is still in a position to do this, *mandati* may be brought in spite of the renunciation of the mandatory, unless some good reason has prevented him making the renunciation, or making it within a proper time" (*Inst. Lib. 3, tit. 26, G.*). A judgment against one having accepted a mandate, and neglecting it in such a way that the giver sustained damage, was, in the time of the Republic, very severe and in the nature of a penalty; upon conviction, the defaulter not only was liable for the loss occasioned to the giver of the mandate, but he was forever deprived of the right to vote, or to hold office. The ceremony by which a man intrusted his friend with a mandate, is described by Plautus:

Tyndarus—Ne tu me ignores, cum ex templo meo e conspectu abcesseris,

Quam me servum in servitute pro hic te relinqueris;

When the authority of an agent is general, it will be construed liberally, but according to the usual course of business in such matters.¹ When the authority is given by parol, and is ambiguous, it is to be construed according to the course of trade in such matters;² and, where it is unexpressed, it is to be ascertained by investigating the course of dealing pursued between the several parties to the transactions. Where an

Tuque te pro libero esse ducas, pignus deseras,
Neque des operam, pro me ut hujus reducem facias filium,
Scito te hinc minis vingiti æstimatum mittier.
Fac fidelis sis fideli: cave fidem fluxam geras.
Nam pater, scio, faciet, quæ illum facere oportet, omnia.
Serva in perpetuum tibi amicum me, atque hunc inventum
inveni,

Hæc per dexteram tuam, te dextera retinens manu,
Obsecro, infidelior mihi ne fuas, quam ego sum tibi.
Tu hoc age: tu mihi herus nunc es, tu patronus, tu pater;
Tibi commendo spes opesque meas.

Philocrates—

Mandavisti satis.

Satin' habes, mandata quæ sunt, facta si refero?

Tyndarus—

Satis.

Captivi, Act ii. Sc. 3.

If no damage was sustained by the default of the acceptor of a mandate, no penalty was imposed upon the defaulter. Dig. Lib. 17, tit. 1, l. 8 § 6; Pothier, Pand., Lib. 17, tit. 7, n. 17; Inst. Lib. 3, tit. 27, § 11.

¹ Story on Cont. § 75.

² Story on Cont. § 82; Grant v. Ludlow, 8 Ohio St. 54; Marfield v. Douglas, 1 Sandf. 360; 3 Comst. 70; and the meaning of particular technical words in the instructions will often be left to the jury (Story on Cont. § 75). Where an agent authorized to make a certain contract makes one differing in its precise terms, but of the same legal effect, or securing additional advantages to the principal, it will bind the principal (Simonds v. Clapp, 16 N. H. 222; and see Olyphant v. McNair, 41 Barb. 446). Usage of trade is allowed in evidence in interpretation. Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326; May v. Mitchell, 5 Humph. 365; Taber v. Cannon, 8 Metc. 458; Webber v. Williams College, 23 Pick. 302; Savage v. Rex, 9 N. H. 263; Paige v. Stone, 10 Met. 160; Demson v. Tyson, 17 Vt. 549; Hazeltine v. Miller, 44 Me. 177; Gould v. Norfolk, &c. Co., 9 Cush. 343; Temple v. Pomroy, 4 Gray, 128; Kent v. Bornstein, 12 Allen, 342.

express authority is given, an authority is implied combined with it to do all acts which may be necessary for the purpose of effecting the object for which the express authority is given. A general parol authority may be enlarged by parol, or even an additional authority superadded to it by the course of employment of the parties known to and acquiesced in by them.¹ For instance, a merchant may authorize a clerk to accept or indorse bills of exchange for him; but this will not of itself authorize his paying or receiving money due on such bills. But, if, in the course of his employment, the clerk has, with the knowledge of the merchant, been allowed to do so, this will constitute a sufficient authority for that purpose, and will discharge the holders of the bill. An agent, employed to negotiate and conclude contracts, is not thereby authorized to pay or receive money which becomes due under such contracts; but the course of employment may justify the agent in so paying or receiving the money, if known to the principal, and not objected to by him. (*l*) If a principal employs an agent in a particular trade or business in which there are established usages regulating the powers and duties of agents, the authority of the agent is regulated by such usage. (*m*) We have seen that oral evidence is admissible to show that a party contracting in writing was an agent, so as to give the benefit of the contract to an unnamed principal;² it is in like manner admissible to fix the principal as the party really interested in the matter, and make him liable upon the contract. (*n*) Thus,

(*l*) *Pole v. Leask*, 28 Beav. 562.

(*m*) *Sweeting v. Pearce*, 7 C. B. N. S. 449 29 L. J. C. P. 265.

(*n*) *Higgins v. Senior*, 8 M. & W.

844. *Beckham v. Drake*, 9 M. & W. 5; 11 M. & W. 317. *Calder v. Do*

¹ See page 100. note 2.

² *Ante*, section 50.

where, by a bought note containing the terms of a contract for the sale of wool, and also by the invoice, Read appeared to be the buyer of the wool, oral evidence was admitted to show that Read was in reality the agent of Hart, and that Hart had directed the wool to be delivered at a particular spot, and had there received it; and Hart was accordingly made chargeable upon the contract, although he did not appear upon the face of it as a purchaser. (*o*) And in the case of oral agreements, although an agent contracts for the purchase of goods in his own name, and apparently on his own account, so as to make himself personally liable to the vendor for the payment of the price of them, yet the principal, when once discovered, is also liable; but, whether the agreement be oral or in writing, the principal can not be charged if he has bona fide paid the agent at a time when the vendor still gave credit to the agent, and knew of no one else as principal. (*p*) If the vendor, at the time he strikes the bargain, knows that the party he is dealing with is an agent, but does not know who the principal is, and consequently debits the agent in the first instance, he may nevertheless, when he finds out the principal, claim payment of the latter, (*q*) provided he makes his election so to do within a reasonable time. (*r*) But if, at the time the contract of sale is made, the vendor knows that the buyer, though dealing with him in his own name, and pledging his own credit, is in reality an agent, and knows also who the principal is, and, not-

bell, L. R. 6 C. P. 486; 40 L. J. C. P. 224. *Armstrong v. Stokes*, L. R. 7 Q. B. 598; 41 L. J. Q. B. 253.
 (*o*) *Wilson v. Hart*, 7 Taunt. 295.
Humfrey v. Dale, 27 L. J. Q. B. 390.
 (*p*) *Armstrong v. Stokes*, L. R. 7 Q. B. 598; 41 L. J. Q. B. 253.

(*q*) *Kymer v. Suwercroft*, 1 Campb. 109. *Thomson v. Davenport*, 9 B. & C. 78. *Thomas v. Edwards*, 2 M. & W. 216.
 (*r*) *Smethurst v. Mitchell*, 1 EL & EL 623; 23 L. J. Q. B. 241.

gaining such knowledge, chooses to give credit to the agent, and make him his debtor, he can not afterwards resort to the principal for payment. (s) If an agent, having made a contract in his own name, has been sued on it to judgment, no second action is maintainable against the principal. (t) If an agent has borrowed money for his principal, and the money has been received by the latter, he may be sued in an action of debt by the lender, although the money was lent at the time he lent the money, supposed that the agent was the borrower. (u) The burden of proof in an agency is on the person dealing with any one as an agent, through whom he seeks to charge another as principal; he must show that the agency did exist, that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it. (x)

Of the agent's authority to sign writings for the principal.—Except for the purposes described in the first, second, and third sections of the statute of 1845, viz., for the purpose of creating leases, estates for life, or any uncertain interest in lands, tenements, or hereditaments, other than leases under three years, and except in the case of agents appointed by a corporation to bind the corporate body to certain contracts, a mere verbal authority to the agent will suffice to bind the principal; and, in the great majority of cases, an authority binding one man to the acts of another, is raised by implication of law. (y) Any person who accredits another by employing him in any

Person v. Gandasequi, 15 East, 241.
Tomson v. Davenport, 9 B. & Ald. 241.
Binethurst v. Mitchell, 28 L. J. Ex. 241.
Westley v. Fernie, 34 L. J. Ex. 241.

(u) *Samuel v. Green*, 10 Q. B. 262.

(x) *Pole v. Leask*, 33 L. J. Ch. 155; 28 Beav. 562.

(y) *Ridgway v. Wharton*, 6 H. L. C. 236; 27 L. J. Ch. 46.

particular course of dealing, is bound by what has been done by such agent in the course of his usual employment, and is responsible to third parties who have dealt with the agent in reliance upon the power and authority with which he was apparently clothed by the principal. (2) If B has repeatedly signed A's name to policies of insurance, or to bills or notes, and A has subsequently recognized and sanctioned such signatures, the law will imply a general warrant from A to B, authorizing the latter to sign in A's name, and A will continue liable upon such contracts made by B in the name of A until the determination of the implied general authority has been publicly announced. (a) From repeated instances of employment, the law infers the existence of an implied general authority to the party employed to bind the employer within the limits of the previously recognized dealings. (b)¹ But an agent employed specially to sign a contract for his principal upon one particular occasion, is not impliedly clothed with any general authority to sign contracts for him. And a person whose agency has been strictly confined to bill transactions, has no implied authority to give a guarantee. The liability of the principal is always to be measured by the nature and extent of the

(2) *Whitehead v. Tuckett*, 13 East, 408. *Watkins v. Vince*, 2 Stark. 368. Holt, C. J. *Anon.* 12 Mod. 564. *Attwood v. Munnings*, 7 B. & C. 278. *Edmunds v. Bushell*, 15 L. J. Q. B. 20.

(a) *Neal v. Irving*, 1 Esp. 61. *Brockbank v. Sugrue*, 5 C. & P. 21.

(b) *Todd v. Robinson*, R. & M. 217. *Gilman v. Robinson*, Id. 226. *Hazard v. Treadwell*, 1 Str. 506.

¹ *Webber v. Williams College*, 23 Pick. 302; and see cases cited ante in note 2, p. 100. A general authority to an agent to collect debts, and to pay and receive money, does not authorize him to bind his principal by negotiable instruments; such an authority must be expressly conferred, or reasonably implied from the nature of the business to be done. *Rossiter v. Rossiter*, 8 Wenl. 496; *Emerson v. Providence Hat Mfg. Co.* 12 Mass. 237.

previous employment of the agent ; and it is the duty of parties dealing with a person who professes to be an agent, but is not notoriously so, to ascertain the nature and extent of his authority before they deal with him. If they neglect so to do, and it afterwards turns out that the agent had no authority, or has exceeded his authority, the principal will not be bound, and the only remedy they can have will be against the agent himself who has misled them. (c) The fact of a landlord employing a steward to let and manage his property does not clothe the steward with a general authority to grant leases, or to enter into agreements for leases, without the sanction of the landlord, or contrary to his express directions. (d) And the agent of an insurance company derives no authority from the mere fact of his agency, to enter into a contract to grant a policy of insurance without the sanction of the directors. (e) An agent has, in general, no authority to borrow money on account of the principal, so as to render the latter responsible as the borrower, unless it can be proved that the principal has previously sanctioned such a course of dealing on the part of the agent, or has subsequently adopted and ratified the loan. (f) When an agent has been authorized to accept bills in the name of the principal, he may, it seems, under certain circumstances, select the hand of another person to carry the intention into effect without violating the rule "*delegatus non potest delegare.*" (g)

58. *Special authority.*—An agent intrusted with the performance of a particular duty, has an implied,

(c) *Smout v. Ilberry*, 10 M. & W. 1.
Pohill v. Walter, 3 B. & Ad. 114.

(f) *Hawtayne v. Bourne*, 7 M. & W. 599.

(d) *Collen v. Gardner*, 21 Beav. 542.

(g) *Lord v. Hall*, 8 C. B. 630; 19

(e) *Linford v. Provinc. Horse, &c.*
Ins. Co. 10 Jur. N. S. 1066.

L. J., C. P. 46.

authority to do all such incidental acts as are usual and necessary for the purpose of carrying the main object of the principal into effect. Therefore, an agent employed to get a bill discounted, and not restricted as to the mode of doing it, may indorse it in the name of the principal, to facilitate its being cashed, and bind the latter by such indorsement. But, if he is expressly ordered by the principal not to put his name to the bill, and has not been employed by the principal as his general agent to discount and indorse bills, the principal cannot be made liable upon it. (*h*)¹ And, whenever one person is sought to be charged by the acceptance or indorsement of another, in consequence of the latter having, on previous occasions, drawn and accepted, or indorsed, bills in his name, it must be distinctly shown that he knew of, and had sanctioned, such previous acceptances or indorsements. (*i*) The customary mode of indorsement, through the medium of an agent, is by the agent's signing the name of the principal, adding under it "per procuration A B," the agent writing his own name. The arrangement of the words is quite immaterial, provided they plainly

(*h*) *Fenn v. Harrison*, 3 T. R. 757. R. 49. *Fearn v. Filica*, 7 M. & Gr. 523.
 (*i*) *Davidson v. Stanley*, 3 Sc. N. 523.

¹ *Dow v. Green*, 16 Barb. 72; *Chedsey v. Porter*, 9 Harris (Pa.) 890; *Williams v. Mitchell*, 17 Mass. 90. Authority to an agent will generally be understood to include all usual and necessary means of executing it with effect. *Story on Agency*, 5, 8; *Payne v. Potter*, 9 Iowa, 549; *Rogers v. Kneeland*, 10 Wend. 218; *Denman v. Bloomer*, 11 Ill. 177; *Nelson v. Hudson River R. R. Co.*, 48 N. Y. 498; *Adams Express Co. v. Trego*, 35 Md. 47; *Sprague v. Gillett*, 6 Metc. (Mass.) 91; *Fowler v. Bledoe*, 8 Humph. 509; *Merrick v. Wagner*, 44 Ill. 266; *Sheldon v. Atlantic, &c. Ins. Co.*, 26 N. Y. 460; *Woodbury, &c. Bank v. Charter Oak Ins. Co.*, 31 Conn. 526; *New England, &c. Ins. Co. v. Schellter*, 38 Ill. 167; *Insurance Co. v. Wilkinson*, 13 Wall. 222.

express that the indorsement is made by one man on behalf of another—as A for B, B by A, or by procuration of A, &c.; but the name of the principal, whether the bill be drawn, accepted, or indorsed by the agent, must appear on the face of the bill, in order to express that the principal does the act through the medium of his agent; for, if the agent merely signs his own name, the principal cannot be made liable upon it. (*k*) When, however, a firm in partnership trade under the name of “A & Co.,” and such partnership name appears on the face of the bill, all the members of the firm are liable upon it, although their individual names do not appear.¹

59. *Contracts by infant agents.*—The principal cannot rely upon any personal incapacity on the part of his agent to contract, as a defense against an action brought by those who have dealt with such agent; for the principal, who has employed and accredited the agent, cannot impugn his own act in the choice he has made. Therefore, although a person under age cannot contract so as to bind himself for anything beyond the necessities of life, he may nevertheless contract so as to bind his employer. (*l*) “If,” observes Pothier, “a merchant has intrusted the management of his business to a minor, he is liable to the obligations arising from the contracts made by such minor, without having any right to oppose his want of age.” (*m*)²

(*k*) *Barlow v. Bishop*, 1 East, 432.
Emly v. Lye, 15 East, 9.

(*m*) Pothier (Obligations), No. 450
 Dig. lib. 14, tit. 3, lex 7.

(*l*) *Watkins v. Vince*, 2 Stark, 368.

¹ It has been held, however, that authority in an agent to receive payment of a note, does not necessarily include power to make any arrangement with regard to it, of benefit to the owner. *Woodbury v. Larned*, 5 Min. 339.

² And not only infants, but monks, femes covert, persons attainted, or outlawed, or excommunicated, may be agents (*Story*

60. Subsequent ratification by the principal.—

Although no previous authority may have been given by the principal to the agent, to enter into and sign the contract upon which the principal is sought to be charged, yet, if there be subsequent acts of assent or acquiescence on the part of the principal, he is as much liable upon the contract as if a previous authority had been duly given. “*Omnis ratihabitio retrotrahitur, et mandato priori æquiparatur.*” (n)¹ If a bill or note

(n) *Soames v. Spencer*, 1 D. & R. *Fitzmaurice v. Bayley*, 26 L. J. Q. B. 32. *Maclean v. Dunn*, 1 M. & P. 761. 115.

on Agency, § 7; *Chastain v. Bowman*, 1 Hill (S. C.) 270). A husband may act as agent for his wife (*Ready v. Bragg*, 1 Head (Tenn.) 311), and make livery to her (*Hopkins v. Molli-neux*, 4 Wend. 465); and see *Pickering v. Pickering*, 6 N. H. 124; *McKinley v. McGregor*, 3 Whart. 369; *Felker v. Emerson*, 16 Vt. 645.

¹ A subsequent ratification has a retrospective effect, and is equivalent to a prior command. *Kelsey v. National Bank, &c.*, 69 Pa. St. 426; *Chapman v. Lee*, 47 Ala. 143; *Meehan v. Forrester*, 52 N. Y. 277; *Hazard v. Spears*, 2 Abb. App. Dec. (N. Y.) 353; *Frank v. Jenkins*, 22 Ohio St. 597; *Stainsbury v. Frazer's, &c. Life Boat Co.*, 3 Daly, 98; *Ketchum v. Verdell*, 42 Ga. 534; *Murray v. Walker*, 44 Id. 58; *Lester v. Kinne*, 37 Conn. 9; *Bassett v. Brown*, 105 Mass. 551; *Rowan v. Hyatt*, 45 N. Y. 138; *Hawkins v. Baker*, 46 Id. 666; *Reynolds v. Davison*, 34 Md. 662; *Partridge v. White*, 59 Me. 564; *Krider v. Western College*, 31 Iowa, 547; *Grant v. Beard*, 50 N. H. 139; *Baldwin v. Burrows*, 47 N. Y. 199; *Hammond v. Hannin*, 21 Mich. 374; *Wright v. Burbank*, 64 Pa. St. 247; *Gullick v. Grover*, 33 N. J. L. (4 Vroom.) 463; *Drakeley v. Gregg*, 3 Wall. (U. S.) 242; *Vincent v. Rather*, 31 Tex. 77; *Stoddart's Case*, 4 Ct. of Cl. 511; *Fowler v. Pearce*, 49 Ill. 59; *Ridenour v. Wherrett*, 30 Ind. 485; *Williams v. Storm*, 6 Coldw. (Tenn.) 203; *Hardeman v. Ford*, 12 Ga. 205; *Billings v. Morrow*, 7 Cal. 171; *Pittsburgh R. R. Co. v. Gazzam*, 32 Pa. St. 340, *Adams Express Co. v. Trego*, 35 Md. 47; *Combs v. Scott*, 12 Allen (Mass.) 493; *Odiorne v. Maxcy*, 13 Mass. 178; *Conn v. Penn*, 1 Pet. 496; *Pratt v. Putnam*, 13 Mass. 361; *Fisher v. Willard*, Id. 379; *Boynton v. Turner*, Id. 391; *Copeland v. Merchant's Ins. Co.* 6 Pick. 198; *Dan v. Wright*, 1 Pet. 72

be signed without authority by A's servant or agent, in the name of A, a subsequent promise by the latter to pay the bill is equivalent to a prior authority; (*o*) and, if the proceeds of such a bill are applied to A's use or for his benefit, with his knowledge or concurrence, such application of the money obtained upon the bill, will, of itself, amount to a subsequent sanction and ratification of the act of the agent. (*p*) An adoption of the agency as to one part of a contract, generally operates as an adoption of the whole transaction; for an act cannot be affirmed as to so much as is beneficial, and rejected as to the residue. (*q*) "The principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent and with all the consequences which follow from the same act if done by his previous authority." (*r*)¹ The subsequent ratification of the contract by the principal, relates back to the time when it was made by the agent; and in those cases where, by the statute of frauds, the contract is required to be authenticated by writing, such ratification renders the agent an agent duly authorized to bind his principal, under the provisions of the stat-

(*o*) *Fenn v. Harrison*, 4 T. R. 177. *Horsfall*, 4 C. B. N. S. 450; 27 L. J. C. P. 193. *Fitzmaurice v. Bailey*, 8

(*p*) *Bolton v. Hillersden*, 1 Ld. Ell. & Bl. 868. As to the subsequent ratification of the acts of bailiffs and

(*q*) *Hovil v. Pack*, 7 East, 166.

(*r*) *Tindal, C. J. Wilson v. Tumon*, 6 Sc. N. R. 904. *Berwick v. W. 834.*

Buchanan v. Upshan, 1 How. (U. S.) 56; S. C. 17 Pet. 70; *McCracken v. San Francisco*, 16 Cal. 591; *Forbingham v. Haley*, 3 Mass. 68; *Ledt v. Padelford*, 10 Id. 230.

¹ But a ratification of the act of an agent, which will defeat the intervening rights of a third party, will come too late. *Stoddart's Case*, 4 Ct. of Cl. (U. S.) 51.

ute, at the time the contract was entered into (s)

61. *Limitation of authority.*—If an agent exceeds his authority, in cases where it is notorious that the authority of the agent is generally limited, the principal will not be liable beyond the extent of the authority given; and, if the contract is indivisible, the principal will not be liable at all. Thus, where the defendant authorized a broker at Liverpool to underwrite marine policies for him, "not exceeding £100 by any one vessel," and the broker underwrote a policy for £150, and at Liverpool it is notorious that there is generally a limit fixed between the principal and the broker, though this limit is not disclosed to the public, it was held that the agent had no authority to underwrite for £150, and that, the contract being indivisible, the assured could recover nothing from the defendant in respect of the policy. (t)¹

62. *Publication of revocation of authority.*—In order to determine the liability of the principal, to third parties who have dealt with the agent in ignorance of the determination of his authority, the principal must make the revocation as notorious to the world at large,

(s) 1 M. & P. 777. Si je contracte au nom d'une personne qui ne m'avait point donnée de procuration, sa ratification la fera pareillement reputer comme ayant contracté elle même par

mon ministère, car la ratification équivaut à procuration.—Poth. Traité des Obligations, No. 75.

(t) Barnes v. Ewing, L. R. 1 Ex. 320; 35 L. J. Ex. 194.

¹ *Ante*, note 2, p. 100; and see *Goulding v. Merchant*, 43 Ala. 705; *Listen v. Allen*, 31 Md. 543; *Enos v. Hamilton*, 24 Wis. 658; *Hynes v. Jungren*, 8 Kan. 391; *Cosgrove v. Ogden*, 49 N. Y. 255; *Tucker v. Woolsey*, 64 Barb. 142; 6 Lans. 482; *Butler v. Kaulbock*, 8 Kan. 668; *Taylor v. Guest*, 4 How. Pr. (N. Y.) 277; *Barney v. Buena Vista Co.*, 33 Iowa, 261; *Mercy v. Webb*, 65 Barb. 22; *McGraw v. Godfrey*, 14 Abb. (N. Y.) Pr. N. S. 397; *Hiles v. Upton*, 24 La. An. 427; *Hunt v. Chapin*, 6 Lans. (N. Y.) 502; *Galbraith v. Lineberger*, 69 N. C. 145.

the existence of the previous general authority
employment. (*u*)¹ When a person has dealt with
man on credit, it is not sufficient to give notice
tradesman's servant that he means to pay
money in future; it must be given to the
himself, unless the servant is a foreman or
having the general superintendence of the
(*x*)²

Misrepresentation and fraudulent concealment
s.—A principal is liable to an action for
fraudulent misrepresentation of his agent, acting
course of his business, and for the master's
though no express command or privity of
er be proved, (*y*) except in cases where the
has not in anywise sanctioned, or adopted,
d to take the benefit of, the fraud. (*z*) "If,"

Tr. des Ob. No. 449. Atherton, 7 H. & N. 172; 30 L. J. Ex.
and v. Freeman, 3 Esp. 338. Swift v. Winterbotham, L. R. 8
Q. B. 244.
v. English Stock Joint (z) Grant v. Norway, 10 C. B. 605.
2 Ex. 259. Udell v. Coleman v. Riches, 16 Id. 104.

see Tyler v. Ames, 6 Lans. (N. Y.) 280; Weile v.
ates, 7 Ct. of Cl. 535; Succession of Massin, 24 La.
Jacobs v. Warfield 23 Id. 395; Strachan v. Minxlow,
r; Shiff v. Lesseps, 25 La. An. 185. The revocation
cy becomes operative as to the agent from the time it
made known to him, if by letter, from the date of
ot of the letter, and not from the date of mailing
n v. Cloud, 47 Miss. 208; Fellows v. Hartford, &c.
t Co., 38 Conn. 197). An agency to sell land, is re-
t any time before sale, unless coupled with an in-
given for a valuable consideration (Brown v. Pforr,
o). Where a debtor has settled with an agent of his
without notice of a revocation of the agent's powers,
arged, and the remedy of the principal is against the
arris v. Cuddy, 21 La. An. 388.

the rule of the common law that an act done under
given to two or more persons, is valid to bind the
only, when all of them concur in doing it. Where

observes Lord Abinger, "the clerk of a merchant or tradesman offers goods for sale to a customer, with a representation very material to their value, which representation his master knows to be false, but the clerk supposes to be true, whereupon the customer gives double the real value of the goods, the contract ought to be dealt with in the same way as if the master himself had made the representation." (a) If the representation forms part of the contract, the principal must take the contract in its entirety. "Wherever," observes Lord Kingsdown, "an agent makes a contract on behalf of his principal, whether with or without authority, the principal can not approbate and reprobate the contract. He must adopt it altogether, or not at all; he can not at the same time take the benefit which it confers and repudiate the obligation which it imposes." (b) "Whatever the previous authority of the agent," further observes Wilde, B., "whatever the principal's own innocence, he must, as it seems to me, adopt the whole contract, including the statements and representations which induced it, or repudiate the contract altogether. There are, no doubt, many frauds committed by agents which do not bind their principals; but I hold that the statements of the agent which are involved in the contract as its foun-

(a) 6 M. & W. 385. *Schneider v. N. R.* 700. *Wheelton v. Hardisty*, 9 Heath, 3 Campb. 508. *Everett v. Ell. & Bl.* 260.
Desborough, 3 M. & P. 204. *Holt, C.* (b) *Bristowe v. Whitmore*, 9 H. L. J. *Herne v. Nicholls*, 1 Salk, 289. *Ld. C.* 391; 28 L. J. Ch. 801. And see the judgment of Wilde, B., *Udell v. Ellenborough*, *Crockford v. Winter*, 1 Campb. 127. *Taylor v. Green*, 8 C. Atherton, 7 H. & N. 172; 30 L. J. & P. 316. *Wright v. Crookes*, 1 Sc. Ex. 340.

a commission vests power in two without words of survivorship, and one of them dies, such death revokes the authority of the survivor. *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180; *Wilson v. Stewart*, 3 Pa. Law J. Rep. 450.

dation or inducement are in law the statements of the principal." (c)

All deceits and frauds practiced by agents do not fall upon their principals; for, unless the fraud itself falls within the actual or the implied authority of the agent, it is not necessarily the fraud of the principal,¹ therefore it was held that a shipowner was not responsible for the fraud of the captain in signing bills of lading without having received any goods on board, (d) and that a wharfinger was not liable for a false receipt, which his agent had given, representing that goods had been received at the wharf, when no such goods had been received. (e) "In neither of these cases did the principal authorize or in any way adopt or obtain the benefit of the fraudulent act." (f)²

64. *Liabilities of principals on contracts under seal.*—If, in a contract under seal, the principal is made to covenant in his own name, and not in the name of his agent, and the deed is executed in the name of the principal, and the agent's authority to execute the deed is under seal, the principal is liable upon it just the same as if he had personally sealed and delivered the instrument; but, if the agent has covenanted in his own name on behalf of the principal, the action

(c) Wilde, B., *Udell v. Atherton*, 7 H. & N. 172; 7 Jur. N. S. 779.

(e) *Coleman v. Riches*, 16 Id. 104.

(d) *Grant v. Norwry*, 10 C. B. 688.

(f) Wilde, B., *Udell v. Atherton*,

supra.

¹ But a principal employing an agent to do an illegal act, is responsible for the injury done, whether the agent acts innocently or maliciously. *Hynes v. Jungren*, 8 Kan. 391; and see *Enos v. Hamilton*, 24 Wis. 658.

² And see *Durst v. Burton*, 47 N. Y. 167; *Rhea v. Puryear*, 26 Ark. 344; *White v. Ward*, Id. 445; *Potter v. Harvey*, 30 Iowa, 502; *Morse v. Ryan*, 26 Wis. 356; *Enos v. Hamilton*, 24 Wis. 658; *Lister v. Allen*, 31 Md. 543; *Campbell v. Nichols*, 33 N. J. L. (4 Vroom.) 81.

may be brought against the agent, who, in such a case constitutes himself the trustee of the principal. (*g*) The principal is not, in any case, liable upon a deed, unless the authority of the agent to make and execute the deed is under seal; (*h*) but there is an exception in the case of two joint contractors, one of whom, it has been held, may execute a deed for himself and the other without an authority under seal, provided the execution be made "for himself and the other, in the presence of that other." (*i*)

65. *Warranties by agents*.—It has been held that a buyer who takes a warranty from a known agent or servant, professedly selling on behalf of his principal or master, takes the warranty at the risk of being able to prove that the agent had the principal's authority for giving the warranty, and that the law clothes the known servant intrusted to sell with no implied authority to warrant, unless such servant is the general agent of a tradesman employed in the trade or business of buying and selling; (*k*) but, although a vendor who employs an agent to sell, gives the latter no authority to warrant, yet, if the agent does warrant, and thereby obtains a largely enhanced price, which never could have been procured if the warranty had not been given, it seems inconsistent with all ordinary principles of law and justice to allow the principal to retain the money and repudiate the warranty by which it was obtained. Finding that the agent had exceeded his authority by giving a warranty, the principal is doubtless entitled to repudiate the transaction alto-

(*g*) Co. Litt. 258, n. Anon. Moore, 70, pl. 19. White v. Cuyler, 6 T. R. 176.

(*h*) Steiglitz v. Egginton, 1 Holt, 141.

(*i*) Ball v. Dunsterville, 4 T. R. 313.

(*k*) Brady v. Tod, 9 C. B. N. S. 592; 30 L. J. C. P. 223. Udell v. Atherton, 7 H. & N. 114; qualifying Alexander v. Gibson, 2 Campb 555. Helyear v. Hawks, 3 Esp. 71.

gether; but, if he receives the money, and refuses to return it after he has had notice of the warranty, he surely ought to be held to have ratified and adopted the warranty. (1)¹

If a person puts goods into the custody of another whose common business it is to sell, he thereby confers upon him an authority to do all that is necessary and usual to be done to obtain a purchaser; (m) and, therefore, if the servant of a horse-dealer with express directions not to warrant, does warrant, the master is bound, because the servant having a general authority to sell is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed. (n) Here the maxim respondeat superior applies; and the principal has his remedy against the agent for his misconduct. (o) Where a goldsmith's

(1) Parke, B., *Cornfoot v. Fowke*, 6 M. & W. 373. *Hern v. Nicholls*, ante, p. 112. *Armory v. Delamirie*, 1 Str. 505.

(m) *Dingle v. Hare*, 7 C. B. N. S. 145; 29 L. J. C. P. 148.

(n) Bayley, J., *Pickering v. Busk*, 15 East, 45. *Howard v. Sheward*, 36 L. J. C. P. 42.

(o) *Ld. Kenyon, C. J., Fenn v. Harrison*, 3 T. R. 760.

¹ But authority without restriction to an agent to sell, carries with it the authority of a warrant (*Schuschart v. Allen*, 1 Wall, 359; *Damon v. Inhabitants of Granby*, 2 Pick. 345; *Andrews v. Kneeland*, 6 Cow. 354; *Palmer v. Hatch*, 46 Mo. 585; *Sprague v. Gilett*, 9 Met. 91); but see *Scott v. McGrath*, 7 Barb. 53; *Bryant v. Moore*, 26 Me. 84; *Lipscomb v. Kitrell*, 11 Humph. 256; *Bank of Indiana v. Bugbee*, 1 Abbott, App. Dec. (N. Y.) 86; *Seiple v. Irwin*, 38 Pa. St. 513; *Law v. Stokes*, 32 N. J. L. 246). As to whether an auctioneer has a right to warrant, by virtue of his employment, see the *Monte Allegro*, 9 Wheat, 645, 647, where it was held, that they have no such authority, without explicit instructions; but see *Story on Agency*, § 107, which supports a more modified view. In cases of judicial sales, however, there is no authority to warrant. *Id.* the *Monte Allegro*, 9 Wheat, 645; *Port v. United States*, 1 Dev. Ct. of Cl.; *Packett v. United States*, *Id.* *Yates v. Bond*, 2 McCord, 382; *Basshore v. Whisler*, 3 Watts. 490. *Leopold v. Vankirk*, 27 Wis. 152; *Giffert v. West*, 33 Wis. 617.

apprentice sold an ingot of gold and silver upon a special warranty that it was of the same value per ounce with an assay then shown, and it appeared that he had forged the assay, and that the ingot was made out of a lodger's plate, which he had stolen, it was held that the master was answerable for the fraud of the apprentice, (*p*) on the ground that the sale took place in the course of business at the master's shop. (*q*) Where the owners of a vessel, which had once been classed A 1 at Lloyd's, authorized their agent, by power of attorney, to charter the vessel or to employ her as a general ship on any voyage, on such terms and in such manner in all respects as he should think proper, and generally to represent the owners in relation to her management or sale as fully as if the owners were personally present, and to do all things necessary for that purpose though the same were not especially mentioned, it was held that the agent had authority to enter into a charter-party with a warranty that the ship was at the time of the charter-party A 1 at Lloyd's, though she was not so described in the power of attorney, and though she had ceased to be so classed when the power was given. (*r*)

If an agent employed by the indorsee of a bill to get it discounted warrants the bill to be a good bill, and receives cash for it on the strength of the warranty, and hands over the money to his principal, and the bill turns out to be a piece of worthless paper, the principal can not retain the money. (*s*)¹ It was his own fault, as Lord Holt has observed, to repose a trust in unworthy hands, and he ought not to be allowed to

(*p*) *Grammar v. Nixon*, 1 Str. 653.

(*r*) *Routh v. Macmillan*, 33 L. J.

(*q*) *Jervis, C. J., Coleman v. Riches*, Ex. 38.

16 C. B. 115.

(*s*) *Fen v. Harrison*, 3 T. R. 177.

¹ See *Giffert v. West*, 33 Wis. 617.

derive a profit from the misconduct of his own servant to the prejudice of an innocent purchaser. (*t*)

66. *Representations by agents not amounting to a warranty.*—It is not every affirmation and representation which will amount to a warranty. If the fact concerning which the representation is made lies as much within the knowledge of the one party as the other, and the agent making the statement merely says what he believes to be true, there is no warranty on the part of the agent of the truth of what he states; it is understood only, under such circumstances, that he does not willfully state that which he knows to be false either to mislead or to lull to sleep the vigilance of the other contracting party. And, if there is, under such circumstances, a defect unknown to the party making the statement, and which the other party had as good means of discovering as the agent himself, the rule of caveat emptor applies. (*u*) A servant, serving in a shop, and demanding only the ordinary market price for the wares he sells, may be asked this and that question as to the fitness of the different articles for particular purposes, and his answers to such queries would, in most instances, be considered the mere expression of his own individual judgment and opinion, given by way of guidance and advice to the purchaser, and not as warranties binding the principal to the truth of his representations.¹

67. *Representations forming no part of the contract with the principal.*—In order to charge the principal it must not only be shown that the representation

(*t*) *Coleman v. Riches*, 16 C. B. 120; (*u*) *Fuller v. Wilson*, *Wilson v. Fuller*, 3 Q. B. 58, 72. *Collins v. Evans* 6 M. & W. 381. 5 Id. 828.

¹ See *ante*, page 115, note 1; *Leopold v. Vankirk*, 27 Wis. 151

was made at the time the contract was entered into, but that it formed part of the foundation on which the contract rests. (x) Therefore, if an agent employed by his principal to find parties willing to contract, and then to send them to the principal to conclude the bargain with him, makes in the course of conversation with them statements and representations respecting the subject-matter of the contract which are not afterwards included in the contract entered into with the principal himself, the latter will not be bound by them. (y) Thus, where a house-agent, on going to show a house, was asked if there was anything objectionable about the house, to which he replied, "Nothing whatever," and, after this conversation, the parties differed about the rent, and the matter was then referred to the principal, and a contract for the letting and hiring of the house was subsequently entered into with the principal himself, which contract made no mention of the previous representation of the agent, it was held that the principal was not bound by the representation. (z)¹

68. *Purchases by a servant in the name of his master.*—If a man sends his servant with ready money to buy goods, and the servant buys upon credit, the master is not chargeable. But, if the servant "usually buys for the master upon tick, and the servant buys some things without the master's order, yet, if the master were trusted by the trader, he is liable." (a) "If goods," observes Lord Ellenborough, "are taken

(x) *Helyear v. Hawke*, 5 Esp. 73.

(y) *Knight v. Barber*, 15 M. & W. 69.

(z) *Cornfoot v. Fowke*, 6 M. & W.

358.

(a) *Holt, C. J., Show. 95. Southby*

v. Wiseman, 3 Keb. 625. *Nickson v.*

Brohan, 10 Mod. 111. *Pearce v. Rogers*, 3 Esp. 214.

¹ See *ante*, page 115, note 1.

up by the master, and the money given afterwards to the servant to pay, I am inclined to think the master liable, if the servant have not paid over the money, for he has given the servant authority to take up goods upon credit. It is therefore material to see when the money was given. If the servant were always in cash beforehand to pay for the goods, the master is not liable, as he never authorized him to pledge his credit; but if the servant were not so in cash, the master gave him a right to take up the goods on credit, and will be liable if the servant has not paid the plaintiff, though he may have received the money from the defendant, his master." (b) If a master sends forth his coachman into the world wearing his livery to hire horses which the master afterwards uses, knowing of whom they were hired, and yet not sending to ascertain if his credit had been pledged for them, an implied authority is given and the master is bound to pay the hire although he may have contracted with his coachman that the latter shall provide horses, and may have paid him a large salary for the purpose. (c) If the father of a family puts his children under the protection of servants, and lives himself at a distance from them, the servants have an implied authority to procure necessary medical advice in case of sudden illness or accident. (d) But, if the plaintiff has shown a want of due caution or has trusted the servant to an improper extent, the master will not be liable. (e)¹

(b) *Rusby v. Scarlett*, 5 Esp. 76.
Pothier, Obl. No. 456. *Arret du Journal des Audiences*, tom. 5. *Miller v. Hamilton*, 5 C. & P. 433.

(c) *Rimel v. Sampayo*, 1 C. & P. 254.
 (d) *Cooper v. Phillips*, 4 C. & P. 584.
 (e) *Stubbing v. Heintz*, 1 Peake, 66

¹ See *Williams v. Mitchell*, 17 Mass. 98. That was a case where a merchant being applied to by A assuming to act in behalf of B, for goods on the credit, and for the use of B, refused to deliver them without a written authority from B. A

69. Authority of foremen and managers.—A foreman entrusted with the general management of a trade or business has an implied general authority from his employer to enter into all such contracts as are usually and necessarily entered into in the ordinary conduct and management of the business. (*f*) Where the foreman of a saw-mill took an order from the plaintiff for a large quantity of Scotch fir staves, and agreed to have them ready for delivery within a particular period, it was held that his master was responsible for the non-fulfillment of the contract, although no particular authority from the master to the servant to enter into that contract could be proved. (*g*) If the acts of agency have been exercised in so open and public a manner that it may reasonably be inferred that the principal must have been cognizant of them, the principal will be liable, although no express authority can be proved. If the agent has published advertisements, and thereby induced parties to contract with him, the principal will be bound by the publicity of the

(*f*) *Summers v. Solomon*, 26 L. J. Q. B. 301. (*g*) *Richardson v. Cartwright*, 1 C. & K. 328.

afterwards produced a writing purporting to be such authority, and received the goods on the credit of it. The order, however, was forged, and the goods never came to B's use. It appearing that A was the general-agent of B, and had frequently paid for goods taken up by A, on the credit and to the use of B, and plaintiff was held entitled to recover. The principle appears to be that where one of two innocent persons must suffer, it must be the one who has by his own acts and conduct made it possible for the fraud to have been perpetrated. Story on Cont. § 56; and see *Chidsey v. Porter*, 9 Harris (Pa.) 390; *Dows v. Green*, 16 Barb. 72; *Merchant's Bank v. Central Bank*, 1 Kelly, 418; *Stain v. Read*, 11 Gratt. 281; *Hunter v. Jameson*, 6 Ired. 252; *Nelson v. Cowing*, 6 Hill, 336; *Woodford v. McClenahan*, 4 Gilman, 85; *Skinner v. Gunn*, 9 Porter, 305; *Bradford v. Bush*, 10 Ala. 386; *Cocks v. Campbell*, 13 Ala. 286; *Ezel v. Franklin*, 2 Sneed. 216.

ment, although no actual authority has been
 It is a question between the principal and
 t; and the public has nothing to do with
 Wherever the principal, by his conduct, has
 the agent to the parties dealing with him as
 general power to act in the premises, his acts
 principal; and the liability of the latter upon
 act can not be qualified by the existence of
 ate instructions which the agent may have
 l. (1) Thus, where J, carrying on business at
 ce, and having a branch establishment at
 placed the latter under the management and
 endence of B, as his agent, and the branch
 was carried on in the name of B & Co., but
 o authority to accept bills, and B nevertheless
 d his authority by the acceptance of a bill of
 e, it was held that J was liable thereon, it not
 his power to divest his agent, by any secret
 on, of the powers incidental to the character of
 which he had empowered him to assume. (k)¹
Telegraph clerks.—A telegraph clerk is only
 d to transmit a telegraphic message in the
 which the sender delivers it; and if he makes
 e in the transmission of the message, the
 not bound by it. (l)²

Maist v. Ditchell, 3 Esp. 35 L. J. Q. B. 20. Pothier, *Traité*
des Obligations, No. 79, 82.
 rough, C. J., 15 East, 42. (k) Edmunds v. Bushell, L. R., 1 Q.
 Taylor, 12 M. & W. 554. B. 97; 35 L. J. Q. B. 20.
 Guire, 3 H. & N. 554; (l) Henkel v. Pope, L. R., 6 Ex. 7;
 465. Edmunds v. Bushell 40 L. J. Ex. 15.

Cases cited *ante*, note 1, p. 119.
 ouse v. Independent Line of Telegraph, 1 Daly
 ee generally as to the company's liability, Shields v.
 on, &c. Telegraph Co., 1 Livingston's Law Mag. 69;
 y Journ. N. S. 311; Orange Co. Bank v. Brown, 9

71. Authority of shipmasters.—Masters of ships have an implied general authority to bind the owners for necessary repairs done or supplies furnished to the vessel under their command; and by the word “necessary” is comprehended such as are fit and proper for the vessel upon her voyage, and such as a prudent owner himself, if present, might be expected to have ordered. (*m*)¹ He may also pledge the credit of the owners for such things as are absolutely necessary for the due prosecution of the voyage. (*n*)² If it be necessary to pay harbor dues, or pilotage, or the like, in ready money, and the master has not been furnished with the necessary funds, he has an implied authority to borrow money, and to bind the owners by a contract for that purpose.³ But this authority does not usually extend

(*m*) Webster v. Seekamp, 4 B. & B. 441. The Aaltjee Willemina, L. Ald. 352. Weston v. Wright, 7 M. & R., 1 Adm. 107.
 W. 396. Stainbank v. Shepard, 13 C. (*n*) Robinson v. Lyall, 7 Price, 592.

Wend. 85; Baldwin v. Collins, 9 Rob. (La.) 468; Allen v. Sewall, 2 Wend. 340; Western, &c., Telegraph Co. v. Ward, 23 Ind. 377; New York, &c. Telegraph Co. v. Drybung, 35 Pa. St. 298; Bowen v. Lake Erie Telegraph Co., 1 Am. Law Reg. 685.

¹ The Gratitude, 3 Robb. 255, 257, 258; Searle v. Scovell, 4 John. Ch. 222; Douglass v. Moody, 9 Mass. 548; Lemont v. Lord, 52 Me. 365.

² Sun, &c. Ins. Co. v. Hall, 104 Mass. 507; see generally as to pledging ship cargo, or credit. The William Carey, 3 Ware, 313; Miller v. Thompson, 60 Me. 322; Nine hundred and twenty-eight barrels of salt, 2 Biss. 319; The Robert L. Lane, 1 Low. 388; Goodwin v. United States, 6 Ct. of Cl. 146; Thomas v. Gittings, Taney, 472; The Lulu, 10 Wall, 192; The Acme, 7 Blatchf. 366; Naylor v. Battzell, Taney, 55; Herwig v. Oakley, Taney, 389; The Circassian, 3 Ben. 398; The Eledona, 2 Id. 31; The Washington Irving, 2 Id. 318, Id. 323; The Grapeshot, 9 Wall, 129, 141; Dunning v. Merchants', &c. Ins. Co., 57 Me. 108; The Kathleen, 2 Ben. 458.

³ The H. B. Foster, 3 Ware, 165; Kensel v. Kirk, 2 Abb. (N. Y.) App. Dec. 500; Stirling v. Loud, 33 Md. 436; Winsor

to cases where the owner can himself personally interfere, as in a home port, or in a port in which he has beforehand appointed an agent who can do the thing required. If the vessel is in a foreign port where the owner has no agent, or in an English port, but at a distance from the owner's residence, and provisions or other things require to be provided promptly, the occasion authorizes the master to pledge the credit of the owner, and make him liable upon the contract.¹ But in all these cases the things must be absolutely necessary to enable the vessel daily to prosecute the voyage. (o) And the owners will not be bound, if the money is borrowed, not upon their credit, but upon the private credit of the master himself. (p) The liability of the owner depends not on his ownership of the vessel merely, but on his having authorized the master to bind him, either expressly, or by his having held out the master as his master, and having thereby induced the vendor to supply the necessities on the credit of the owner. (q)² The master has also, it seems, authority to settle a claim for demurrage made by him for the detention of the vessel at a foreign port. (r)

72. Limitation of the authority of shipmasters.

(o) As to home ports, see the 19 & 20 Vict. c. 97, s. 8. *Arthur v. Barton*, 6 M. & W. 143; *Johns v. Simons*, 3 Q. B. 425. *Stonehouse v. Gent*, Id. 431, n. Poth. (Obl.), No. 448. (p) *Thacker v. Moates*, 1 Mood. & Rob. 80. (q) *The Great Eastern*, L. R., 2 Ad. & E. 88. (r) *Alexander v. Dowie*, 25 L. J. Q. B. 281.

v. Maddock, 68 Pa. St. 201; *Warren v. Skolfield*, 104 Mass. 503; *Stirling v. Nevassa Phosphate Co.*, 35 Md. 128; *Gager v. Babcock*, 48 N. Y. 154.

¹ See page 122, note 2.

² Id.; *Hussey v. Allen*, 6 Mass. 163; *James v. Bixby*, 11 Mass. 34; *Wainwright v. Crawford* 4 Dall. 225; *Millward v. Hallett*, 2 Cai. 77.

—"The authority of the shipmaster is subject to several well-known limitations. He may make contracts for the hire of the ship,¹ but cannot vary those which the shipowner has made." (s)² He may take up money in foreign ports, and under certain circumstances at home, for necessary disbursements and for repairs, and bind the owners for repayment;³ but his authority is limited by the necessity of the case; and he cannot make them responsible for money not

(s) *Harris v. Carter*, 3 Ell. & Bl. 559.

¹ *King v. Lewis* 19 Johns. 235; *Pope v. Nickerson*, 3 Story, § 479. The master can not hypothecate his ship for an existing debt (*Dixon on Shipping*, 52, 68); and if he have money of the owner on board, he must first apply it before resorting to bottomry (*The Packet*, 3 Mason, 255); or possibly if the money belong to shippers (*Dixon on Shipping*, 53, 70). But he cannot hypothecate his ship in any other than a foreign port (*Selden v. Hendrickson*, 1 *Brockenbroughs C. C. R.* 396). Though if the owner be applied to, and furnish no assistance it appears that he may (*Barke v. Brig M. P. Rich*, 1 *Clifford*, 314). If the master expend money of his own upon the ship, he has a right to call upon the owners therefor, and to detain the freight until fully paid his expenses and disbursements (*Dixon on Shipping* 60, 74); and in *Lane v. Penniman*, 4 Mass. 91, it seems to be held, that this lien can be maintained even against the owner. See also *Robinson v. N. Y. Ins. Co.*, 2 Cai. 357; *Lewis v. Hancock*, 11 Mass. 72; *Ingersoll v. Van Bokkell*, 7 Cow. 670; *Chamberlin v. Reed*, 13 Me. 357; *Newhall v. Dunlap*, 14 Id. 180; *The Packet*, 3 Mason, 255; *Drinkwater v. Brig Spartan*, Ware, 149; *Ward v. Green*, 6 Cow. 173; *Harry v. Assignees of Harry*, 2 Wash. 145; *King v. Lennox*, 19 Johns. 235; *Reynolds v. Tappan*, 12 Mass. 370; *Taggart v. Loring*, 16 Mass. 336; *Gernon v. Cockran*, Bees' Adm. R. 209; *Emmery v. Hersey*, 4 Green, 407; *Kemp v. Coughtry*, 11 Johns. 107. As to liens generally, see *Hay v. Steamboat Winnebago*, 10 Wis. 428; *Thorsen v. The J. B. Martin*, 26 Wis. 763.

² *Walter v. Brewer*, 11 Mass. 99; *Ward v. Green*, 6 Cow. 173; *Peters v. Ballister*, 3 Pick. 495; *Schooner Tribune*, 3 Sumner, 144. But his power is limitable by instructions. *Pope v. Nickerson*, 3 Story, 465.

³ *Dixon on Shipping*, 29, 35; *The Fortitude*, 3 Sumner, 233.

actually necessary for those purposes, though he may pretend that it is. (†) He may make contracts to carry goods on freight, but cannot bind his owners by a contract to carry freight free. So with regard to goods put on board, he may sign a bill of lading, acknowledging the nature, quality, and condition of the goods,¹ but his authority to give bills of lading is limited to such goods as have been actually put on board. A party, therefore, taking a bill of lading, either originally or by endorsement, for goods which have never been put on board, is bound to show some particular authority given to the master to sign it, in order to charge the shipowner upon it; (u) nor can the master draw bills of lading making the freight payable otherwise than to the shipowner. (x.) The shipmaster has no authority to sell any part of the ship or cargo, except in a case of absolute necessity;²

(†) *Mackintosh v. Mitcheson*, 4 26 L. J. C. P. 93. *Hubbersty v. Ward*,
Exch. 175. *Edwards v. Havill*, 14 8 Exch. 330. *Coleman v. Riches*, 16
C. B. 107. *Organ v. Brodie*, 10 Exch. C. B. 104; 24 L. J. C. P. 125.
450. (x) *Reynolds v. Jex*, 34 L. J. Q. B.

(u) *Grant v. Norway*, 110 C. B. 687; 251.

¹ *Nichols v. De Wolf*, 1 R. J. 277; *The Phœbe, Ware*, 263. The liability of the owners for the act of a master rest on the presumability that they receive the benefit of his contracts, and that they are made upon the owners' authority and request *James v. Buxby*, 11 Mass. 34; *Dane v. Hadlock*, 4 Pick. 458.

² A master acting in good faith, has, by virtue of his employment, authority to sell the ship in cases of extreme necessity, as where the ship is wrecked, or becomes unnavigable, and he can not procure money for repairs—or means to make them—or when the vessel can not be repaired without an expense of more than half her value when repaired, or where the owner or underwriter are at such a distance that the property would be destroyed or materially injured, before recourse could be had to those to whom it belongs. *The Tilton Tillason* R. 465; *The Sarah Ann*, 2 Sumner, 206, 215; *Gordon v. Insurance Co.* 2 Pick 249; *Winn v. Columbian Ins. Co.* 12 Pick. 279; *Center v. American Ins. Co.* 7 Cow. 564, S. C. Ap. 4

(*y*) or where the sale is warranted by the law of the country in which it takes place ; (*z*)¹ nor has he any authority to hypothecate the ship, or to borrow money upon the credit of the shipowners, after the work has been done, for the purpose of paying the debt due for it. (*a*)² The master of a disabled ship has power under certain circumstances to forward the cargo by another ship ; but he is not the agent of the owners of the cargo, so as to render them responsible for his act in so doing, where he has the opportunity of communicating with them or their agent, and neglects to avail himself of it. (*b*)³ Where the master of a ship contracts as such in a foreign port to carry goods for a foreigner, his authority to bind his owners is that conferred by the law of the country to which the ship belongs ; and the flag of a ship is notice to

- (*y*) *Freeman v. E. I. Co.*, 5 B. & Ald. 621. *The Bonita*, 30 L. J. Adm. 886 ; 20 L. J. Ex. 342.
 145. *The Gipsy*, 33 L. J. Adm. 195. (*b*) *Gibbs v. Grey*, 2 H. & N. 22 ; 26 L. J. Ex. 286. *Duranty v. Hart*, 33 L. J. Adm. 116.
 228 ; 29 L. J. Ex. 350. (*a*) *Beldon v. Campbell*, 8 Exch.

Wend. 45 ; *Fontan v. Phoenix Ins. Co.* 11 Johns. 293 ; *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 620 ; 3 Kent. Com. 174, 175 ; *Robinson v. Commonwealth Ins. Co.* 3 Sumner, 226 ; *Gordon v. Massachusetts, &c. Ins. Co.* 2 Pick. 249 ; *Hall v. Franklin Ins. Co.* 9 Pick. 466 ; *Reid v. Darby*, ; *The Amelie*, 6 Wall. 18 ; *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604 ; *New England Ins. Co. v. Brig Sarah Ann*, 13 Pet. 387 ; *Post v. Jones*, 19 How. 150.

¹ See cases cited p. 122, note 2 ; *Murray v. Lazarus*, 1 Paine, 572 ; *Ross v. Ship Active*, 2 Wash. 226 ; *The Brig Hunter*, Ware, 249.

² But see *Kelly v. Merrill*, 14 Me. 228, which appears to hold that he is such agent to settle all claims against the vessel, which accrue during his mastership thereof.

³ A shipmaster is not the general agent of the owners, except for the purposes of the voyage. *Mervin v. Shailer*, 12 Con. 489. But see, as to sale of the cargo, *Post v. Jones*, 19 How. 150

all the world that his implied authority is limited by the law of that flag. (c)

When ship owners have appointed a shipmaster and placed him in charge of the vessel, and have been in the habit of paying for stores and repairs ordered by such master, the general authority of the latter cannot be revoked or circumscribed by any private contract between the master and the owners, of which the persons dealing with the master are ignorant. Where, therefore, by articles of agreement between the owners and the master of a vessel, the master was to have and employ the vessel for his own sole benefit and advantage for eleven years, at a certain rent, and was at his own cost and charge to repair the vessel, tackle, rigging, &c., it was held that the plaintiffs, who had supplied the vessel with cables by order of the master, without any notice of the contract, were entitled to recover the price thereof from the owners. (d)

Where the ship is let to freight, and the charter party or contract of affreightment operates as a demise or bailment of the ship to the charterer, so as to clothe him with the possession as well as the use of the vessel, and constitute him the temporary owner, the master becomes the agent of the charterer; and the latter, and not the registered owner, is then responsible for stores ordered for the use of the vessel by the master in the course of his employment by the charterer. (e) The shipowner, however, is *prima facie* liable for repairs and stores ordered for his vessel by the master. If, therefore, on looking to the registry, the defendant is found to be the legal owner, a *prima*

(c) *Lloyd v. Guibert*, 33 L. J. Q. B. 241. *The Karnak*, L. R., 2 P. C. 505; 38 L. J. Adm. 57. (e) *Frazer v. Marsh*, 13 East, 238. *Briggs v. Wilkinson*, 7 B. & C. 34; 9 D. & R. 871. *Reeve v. Davis*, 1 Ad.

(d) *Rich v. Coe*, 2 Cowp. 636. & E. 312. *Preston v. Tamplin*, 2 H. & N. 684.

facie liability is established against him. But the register is not conclusive; for the question is a pure question of contract and credit, which, like all other questions of goods sold or work done, must be decided by a jury upon consideration of all the circumstances.

If the charter-party operates, as it generally does merely as a contract for the carriage of merchandise, the shipowner retaining the possession and control of the vessel through the medium of his servants and agents, he cannot repudiate the agency of the master acting as such with his knowledge. Therefore, a ship owner who charters his vessel to another, but not so as to give up possession, is liable for a breach of the contract contained in a bill of lading signed by the master, such as injury to the goods by improper stowage, if at the time of shipment the shipper had no notice of the charter. (*f*) So, where the defendant had never employed the plaintiff himself to do repairs to his vessel, but was the legal owner upon the register, and was in concurrent possession of the ship with a party to whom he professed to have sold it, and was fully aware that the shipmaster who was appointed by the latter was giving orders for repairs, and some of the defendant's servants were on board and in charge of the vessel, it was held that the defendant was responsible for repairs done to the ship by the plaintiff upon the order of the shipmaster. (*g*) Where, on the other hand, the ship owner had sold his shares in a vessel, and had ceased to be beneficially interested in the ship, and was not known as a part owner to the party doing the repairs until after the repairs had been ordered and done, but his name continued on the reg-

(*f*) *The St. Cloud*, 1 B. & L. 4. L. R., 2 Adm. 375; 38 L. J. Adm.
The Figlia Maggiore, L. R., 2 Adm. 63.
 106; 37 L. J. Adm. 52. *The Nepoter*, (*g*) *Frost v. Oliver*, 2 Ell. & Bl. 315.

is held that he was not liable for such repairs, could be shown that the master who gave the them had an express or implied authority to

(*h*) A part owner of a ship has no implied authority to bind his co-owners for repairs. (*i*)

A party is mortgagee of a ship only, taking the security of the ship without intending to assume the liabilities incident to ownership, the circumstance of his being entitled to the vessel, the earnings of the ship, will not make the mortgagee agent so as to bind him in respect of contracts entered into by the master after the date of the mortgage. (*k*)

A mortgagee in possession of a ship is liable for necessaries supplied, unless the master and the mortgagee acted as his agent. (*l*)

A separate action cannot be maintained, against the mortgagee and the owner of a ship, for the same identity of action. The creditor has an election to sue the one or the other; but he cannot, after he has elected the one to judgment, maintain another action against the other. (*m*)¹

v. Robertson, 8 Sc. N. 124. *Mackenzie v. Oliver*, 5 Ell. & J. Q. B. 39. *Howard*, 17 C. B. 118; 57. *Willis* 17 C. B. 103; L. J. C. P. 255. *Hack-*

wood v. Lyall, 17 C. B. 124. *Mackenzie v. Pooley*, 11 Exch. 658; 25 L. J. Ex. 124. (*l*) *The Troubadour*, L. R., 1 Adm. 302. (*m*) *Priestley v. Fernie*, 34 L. J. Ex. 173.

home port a master may bind the owners of the ship by express contracts for fitting out, victualling, or repair, unless it be shown that the owners themselves, or the charterer managed the vessel, and that the parties contracting with the master were aware of the fact (*Dixon on Shipping*, 30, 39; *The Joseph Cunard*, Olcotts R. 120; *Stimson*, 12 Gray, 487; 5 Id. 569). The master has no authority to appoint his own substitute, if obliged, from necessity or other causes, to leave the ship (*Dixon on Shipping*, 33, 43). In the event of his death, the consignee

73. Authority of brokers.—One who employs a broker to transact business for him in a general market as, for instance, upon the stock exchange, impliedly of the ship have power to appoint his successor (*Orne v. Townsend*, 4 Mason, 541). A master may also, if it is in the usual course of employment of his ship, charter her in a foreign port, if the owner has no other agent there (*Ward v. Green*, 6 Cow. 173; *Hurry v. Assignees, &c.*, 2 Wash. 145; *King v. Lennox*, 19 Johns. 235; *Pope v. Nickerson*, 3 Story, 479; *King v. Lewis*, 19 Johns. 235; *Kemp v. Coughtry*, 11 Johns. 107; *Emery v. Hersey*, 4 Greene, 407). He may bind them to a charter-party, but not to one under seal (*Pickering v. Holt*, 5 Greene, 160; *Ward v. Green*, 6 Cow. 173; *Hurry v. Assignees, &c.*, 2 Wash. 145). Nor can he purchase a cargo for his owners, unless specially empowered to do so (*Hewitt v. Buck*, 17 Me. 153; *Thompson v. Snow*, 4 Greenl. 269; *Hathorn v. Curtis*, 8 Id. 356; *Newhall v. Dunlop*, 14 Me. 180; *Lyman v. Redman*, 23 Me. 289); nor can he procure insurance (*General, &c. Ins. Co. v. Ruggles*, 12 Wheat. 408; *Patterson v. Chalmers*, 7 B. Mon. 595).

The master of a vessel is bound to his owners for his own skill, care, attention, and fidelity, and is liable for any lack of these (*Purviance v. Angus*, 1 Dall. 180, 184, 185; *Atkyns v. Barrows*, 1 Pet. Adm. R. 245; *Stone v. Kelland*, 1 Wash. 142; *Scheffelin v. Harvey*, 6 Johns. 170); and the owners may, at any time they see fit, remove the master (*Dixon on Shipping*, pp. 33, 45), or dispossess him by proceedings in Admiralty (*Id.* pp. 34, 46). But the master can not withdraw from a contract to take the ship on a voyage, or quit her in a foreign port, when she is employed as a general-trading vessel (*Id.* 34, 47). It is his duty to bring the vessel home, and even if captured by a belligerent, it is his duty to remain, until the result of the proceedings and the fate of the ship are known (*Willart v. Dorr*, 3 Mason, 255; *Brown v. Lull*, 2 Sumner, 443). But if he is ordered from one series of voyages to another, and kept thus in a perpetual banishment from home, it seems that, if he have made no specific contract, he may give the owners reasonable notice to obtain a substitute, or if they neglect upon such notice to do so, he may appoint one himself. *Id.* Story on Agency, § 478.

The master is generally liable for the diligence and care of all persons under his command; if the owners appoint incompetent persons to serve under him, he may resign; but if he accepts the position, he accepts this liability (*Dixon on*

authorizes him to deal according to the general and known usages and customs of that market, although he may not himself be aware of their existence. But Shipping, pp. 37, 51). And captains in the merchant service, or of steamboats carrying passengers, are responsible for injuries resulting from want of due care in a pilot (*Denison v. Seymour*, 9 Wend. 1; *Porter v. Curry*, 7 L. R. 233; *Patton v. McGrath*, 1 Rice, S. C. 162. The owners of a ship are liable for the torts as well as for the contracts of the master, done within the scope of his employment (*Stone v. Kelland*, 1 Wash. 142; *Bussy v. Donaldson*, 4 Dall. 206; *Purviance v. Angus*, 1 Id. 184; *Atkins v. Burrows*, 1 Pet. Adm. 245; *The Invincible*, 2 Gallis, 41; *Mans v. Almeida*, 10 Wheat, 473; *Wright v. Wilcox*, 19 Wend. 343; *Dusar v. Murgatroyd*, 1 Wash. 13; *St. Jean Baptista*, 5 Rob. 33; *Karasan*, Id. 291; *Talbot & Owners, &c.* 1 Dall. 95; *The Amelia Nancy*, 3 Wheat, 546; *The Mary*, 1 Mason, 365); but not for piracy (*Dias v. Owners, &c.*, 3 Wash. 262.

Under an act of congress passed March 3d, 1851 (9 Stat. at L. 635) "to limit the liability of ship owners, &c.," which see, the master himself is, in the absence of some special agreement, personally liable upon contracts made in reference to the employment, repairs, supplies, and navigation of the ship, or charter-parties or bills of lading signed by him (*Watkinson v. Langhton*, 8 Johns. 164; *Elliot v. Russell*, 10 Johns. 1; *Leonard v. Huntington*, 15 Id. 298; *Marquand v. Webb*, 16 Id. 89; *James v. Bixby*, 11 Mass. 34; *Stewart v. Hull*, 2 Dow. 29; *Amory v. McGregor*, 16 Johns. 24; *Dakey v. Russel*, 18 Martin (La.) 62). If there be a special promise by the masters, the owners are not liable at all. *Hussey v. Allen*, 10 Mass. 163; *Chapman v. Durant*, Id. 47; *James v. Bixby*, 11 Id. 34; and *vice versa*; *Dixon on Shipping*, 48, 64; *Bronde v. Haven Gilpin*, 595.

The admiralty jurisdiction of the United States courts upon the great lakes and rivers, is one daily increasing in importance. In *The Flora*, 1 Bissel, 29, see an elaborate opinion of Drummond, J. of the U. S. seventh judicial circuit reviewing. From a valuable and careful note of the reporter of that case, we condense and continue the following: "It was formerly the doctrine that admiralty jurisdiction extended only as far as the ebb and flow of the tide, and therefore could not embrace the great lakes, and the inland rivers of the West (*The Thomas Jefferson*, 10 Wheat, 428; *Peyroux v. Howard*, 7 Pet. 324; *New Jersey, &c. Navigation Co. v. Merchants' Bank*, 6

when an usage or custom is intended to be relied upon, it ought to be clearly and distinctly proved to exist, and to be so general and notorious that persons

How. 344; *The Steamboat Orleans v. Phœbus*, 11 Pet. 175; *Waring v. Clark*, 5 How. 441; *Gibbons v. Ogden*, 9 Wheat; 195; *Walsh v. Rogers*, 13 How. 283; *Fretz v. Bull*, Id. 466). But in 1857, in *Jackson v. The Steamboat Magnolia*, on an appeal from the district court for the middle district of Alabama, which court had dismissed the record (a libel for collision), for want of jurisdiction, and upon a submission to it of the question as to such jurisdiction, the United States supreme court pronounced that the admiralty jurisdiction of the federal courts embraces cases arising, concerning waters "navigable from the sea," even though they arise upon such waters lying within the body of a state, and "above the flux and reflux of the tide," and that this jurisdiction existed by virtue of the judiciary act of 1789, and was not conferred by the act of 1845, which extends their jurisdiction to the great lakes and waters "not navigable from the sea." Justices Daniel and Campbell, however, strongly dissented from this decision, protesting against it as an usurpation on the part of the judiciary, and as a violation of the Constitution. But subsequently, in *Taylor v. Carryl*, 20 How. 583, and in *Nelson v. Leland*, 22 How. 48, the decision was sustained in the case of a collision on the Yazoo river, two hundred miles above its confluence with the Mississippi. Mr. Justice Campbell (and Mr. Justice Catron with him) still dissenting. Then followed the case of *Hine v. Trevor*, 4 Wall. 555, which held that the admiralty jurisdiction bestowed by the constitution, is not limited to tide water, but embraces all the navigable waters of the United States, wherever vessels float, and navigation successfully aids commerce (*The Genesee Chief*, 12 How. 443). That the grant of admiralty powers to the district courts is conferred by the 9th section of the act of 1789, and is co-extensive with the grant in the constitution as to the character of the waters, over which it extends. That the act of February 26th, 1845, is a limitation of the powers granted by the act of 1789, as to cases arising upon the lakes, and the navigable rivers connecting them (and see *Great West No. 2 v. Obendorf*, 57 Ill. 168; *Fox v. Revenue Cutter*, 8 Am. Law. Reg. 459; *Cunningham v. Hall*, 8 Clifford, 43; and see as to this jurisdiction, *Steamboat Co. v. Chase*, 16 Wallace, 523). In *The Eagle*, 8 Wallace, 15, the supreme court held that district courts may have jurisdiction over all civil causes of admiralty jurisdiction upon the lakes

dealing in the market could easily ascertain it, and must be presumed to be aware of it; and, in order to

and other waters of the United States, which connect with them, the same as upon the high seas, bays, and rivers, navigable from the sea: that it is not necessary in cases arising upon the lakes to bring them within the act of 1845, but that such act, as well as the ninth section of the judiciary act of 1789, which conferred upon the district courts of the United States exclusive original jurisdiction of all civil causes of admiralty jurisdiction "in binding all seizures under laws of impost, navigation, or trade of the United States, when the seizures are made on waters which are not navigable from the sea, by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas, to have become obsolete and inoperative by virtue of decisions of the supreme court, subsequent to their enactment.

The able and valuable decision of Drummond, J., in *The Flora*, 1 Bissell, 29, is believed by the reporter "to have been the first case declaring the doctrine, that the admiralty jurisdiction of the district courts upon the Western lakes and rivers did not depend upon the act of Feb. 20th, 1845" (Id. p. 33). And see also as to jurisdiction, *The Lewellen*, 4 Bissell, 156, 557; *Seven Coal Barges*, 2 Id. 297; and generally *The Lady Franklin*, 1 Id. 557; *The Gray Eagle*, Id. 25; *The Empire State*, Id. 216; *The Portsmouth*, Id. 56; *The Milwaukee Belle*, Id. 197; *The Maitland*, Id. 291; *Proceeds of Lady Franklin*, Id. 121; *The Grace Greenwood*, Id. 131; *The Monitor and Hill*, 3 Id. 24; *The Virginia*, Id. 48; *The Ocean Wave*, Id. 317; *The Lac la Belle*, Id. 313; *The Selt*, Id. 344; *The Hoyle*, 4 Id. 234; *The Lewellen*, Id. 156; *Wickes v. Steamboat Circassian*, *Chicago Legal News*, vol. 5, p. 146; *De Lovio v. Boit*, 2 Gallis, 398; *The Elmira Shepherd*, 8 Blatchf. 341; *Gloucester Ins. Co. v. Younger*, 2 Curtis, 322; *McGinnis v. The Pontiac*, 5 McLean, 359; *Two Ferry Boats*, 2 Bond, 363; *Western Transportation Co. v. The Great Western*, 4 Western Law Monthly, 281; *Franconet v. The Backus Newberry*, 1; *The Young America*, Id. 101; *The Bacon*, Id. 274; *The Jenny Lind*, Id. 443; *The Charles Mears*, Id. 197; *Brooks v. The Peytona*, 2 Western Law Monthly, 518; *The Globe*, 2 Blatchf. 427; *Whittaker v. Lorentz*, Id. 520; *Merritt v. Sackett*, 2 American Law Journal, 341; *Page v. The McDonald*, 27 Legal Intelligencer, 310; *McAllister v. Steamboat Kirkman*, 1 Bond, 369; *The Hardy*, 1 Dillon, 460; *The Transit*, 4 Benedict, 567; *Thackeray v. The Farmer of Salem*, Gilpin, 524; *Wallis v.*

bind persons who were not aware of it, it must also appear to be a reasonable usage. (n)¹

74. *Authority of counsel.*—Counsel retained to conduct a cause is clothed with an apparent authority to do everything belonging to the conduct of it, which, in the exercise of his discretion, he thinks best for the interest of his client;² and, if, acting within the limits of this apparent authority, he enters into an agreement with the counsel for the other side as to the cause, this agreement is binding on the client.³ But counsel has no right to manage a cause against the will of his client or to make a binding agreement as to it, if the other side is in-

(n) *Grissell v. Bristowe*, L. R., 3 C. P. 112; 38 L. J. C. P. 10.

Chesney, 4 Am. Law Reg. 307; *The Ann Arbor*, 4 Blatcf. 205; *Gillespie v. Barge Leonard*, 1 Chicago Legal News, 313; *The Eli Whitney*, 1 Blatcf. 360; *United States v. 269½ Bales of Cotton*, 1 Woolworth, 236; *The Mary Washington*, 1 Abbott, 1; *The Harrison*, 2 Id. 74; *The America*, Lowell, 176; *The Sarah Jane*, Id. 203; *The Island City*, Id. 375; *The Dunlap*, Id. 350; *The City of Norwich*, 1 Benedict, 89; *Wright v. Norwich, &c. Transportation Co.* Id. 156; *The Circassian*, Id. 209; *The Sailor Prince*, Id. 234; *The Adele*, Id. 209; *The Missouri*, 3 Benedict, 508; *The Leonard*, Id. 263; *The Eledona*, Id.; *The Antelope*, Id. 405; *The Norway*, Id. 163.

¹ See generally *Bank of the State v. Bugbee*, 1 Abb. (N. Y.) App. Dec. 86; *Sumner v. Stewart*, 69 Pa. St. 321; *Graham v. Duckwall*, 8 Bush. (Ky.) 12; *McNiel v. Tenth National Bank*, 46 N. Y. 325; *Coddington v. Goddard*, 82 Mass. (16 Gray) 436; *Day v. Holmes*, 103 Mass. 306; *Rosenstock v. Tormey*, 32 Md. 169; *Dilworth v. Bostwick*, 1 Sweeney (N. Y.) 581; *Talmadge v. Nevins*, 2 Id. 38; *Tower v. O'Niel*, 66 Pa. St. 332; *Pickering v. Demeritt*, 100 Mass. 416; *Morris v. Ruddy*, 20 N. J. Eq. (5 C. E. Gr.) 236.

² *Rice v. Wilkins*, 21 Me. 558. See the powers, duties, and liabilities of attorneys and counsellors-at-law in the United States, discussed *post*, in note to Book I., Chapter III.; Book II., section 1, p. 880

³ Id.

at this apparent general authority has been, limited. (o)¹

Simple contracts entered into by agents in their representative character, on behalf of a principal whose name is disclosed at the time of contracting, must, as a general rule, as we have already seen, be enforced by the principal; and the agent cannot bring an action in his own name, (p) unless he can show that he has an interest or a special property in the subject-matter of the contract, or unless he has so acted as to make himself personally responsible for the fulfillment of the contract. (q) But, if a bill of exchange or a promissory note is made payable to the order of, or for "the use," or "for and on behalf," or for the use of, another person named on the face of the instrument, the payee is the proper party to bring an action upon the instrument. (r) When a written contract has been entered into by an agent on behalf of a principal, and the agent's representative character is disclosed on the face of such written contract, the principal is entitled to maintain an action thereon, if the principal interferes to prevent him. (s) So, if an agent carries on trade for his principal in his own name, and ostensibly on his own account, he is not entitled to maintain an action in respect of goods sold in the course of that trade, unless the principal interferes, and asserts his right to the sum. Factors generally sell the goods of their

v. Francis, L. R., 1 Q. B. 365; 35 L. J. Q. B. 136. Lamb, 31 L. J. Q. B. 98. Post, p. 136.

(r) *Evans v. Cramlington*, Carth. 5; 2 Ventr. 307. *Beckham v. Drake*, 9 M. & W. 92, 96.

(s) *Schmatlz v. Avery*, 16 Q. B. 659; 20 L. J., Q. B. 228.

(t) *Gardiner v. Davis*, 2 C. & F. 49.

principal in their own names, and are alone known throughout their dealings and transactions to the purchaser; and they are consequently entitled to maintain an action for the price. "Inasmuch as the agent is the person with whom the contract is made, it is no answer to an action in his name to say that he is merely an agent, unless you can show that he is prohibited from carrying on that action by the person in whose behalf it was made. In such cases you may bring your action either in the name of the person by whom, or of the party for whom, the contract was made." (u)¹

76. *Right of action of factors, auctioneers, and policy-brokers.*—If the agent himself has an interest or a special property in the subject-matter of the contract, he is entitled to maintain an action upon it. Where a broker has advanced money on the credit of a cargo consigned to him by his principal for sale, he is entitled to an action² in his own name against the buyer, although the sale note given by the broker mentions the name of the principal; (x) and the buyer in such a case, cannot set off a debt due to him from the principal, in an action by the agent.³ But if, by the introduction of the name of the principal into the contract, the defendant has been prejudiced, he will be entitled to make use of that circumstance as a defense.⁴ So, too, in the sale of goods by a factor,

(u) Bayley, J., *Sargent v. Morris*, 3 B. & A. 281. (x) *Atkins v. Amber*, 2 Esp. & A. 281. *Clay v. Southern*, 7 Exch. 717. 493.

¹ See *ante*, this chapter, pp. 55-68.

² *McCroskey v. Maury*, 45 Ga. 327; *Thornhill v. Picard*, 24 La. An. 159; *Succession of Norton*, Id. 218. And see generally *ante*, pp. 55-68.

³ Id.

⁴ Id.

although the principal may be named or known at the time of the sale, yet, as the factor has a claim on the price of the goods in the hands of the buyer for the balance due to him on the general account with his principal, he has a right to require payment of the price, to the extent of such general balance, to himself, and not to the principal. (y)¹ An auctioneer has a special property in goods which he is employed to sell, with a lien for the charges of the sale, the commission, &c.; and he may, therefore, maintain an action against a buyer for the price of goods sold by him, although the sale was at the house of the principal, and the goods were publicly known to be the property of the latter. (z)² He has a lien also on the proceeds of the sale as well as on the specific article sold, and seems to be in the same position as a factor who sells goods upon which he has advanced money, so that it is no answer to an action by an auctioneer for the price of goods sold by him to say that before action the defendant paid the price to the principal. (a) But it would be otherwise if the auctioneer's charges had been paid before action, and the purchaser had a good answer to any action by the vendor for the price; (b) and, if goods are sold, to be paid for at a future period, and are delivered to the buyer, without notice from the agent that he has any lien or claim on the price for duty, commission upon selling, or the like, and the buyer,

(y) *Drinkwater v. Goodwin*, Cowp. 255.

(z) *Williams v. Millington*, H. Bl. 81.

(a) *Robinson v. Rutter*, 4 Ell. & Bl. 956; 24 L. J., Q. B. 250.

(b) *Grice v. Kenrick*, L. R., 5 Q. B. 340; 39 L. J., Q. B. 175.

¹ *Id.*

² *Flanigan v. Crull*, 53 Ill. 352; *Thompson v. Kelly*, 101 Mass. 291. And see as to statute in New York, *Russen v. Miner*, 5 Lans. 536; 61 Barb. 534; and see *post*, Chapter I., Book II., Part I., par. 519, as to actions and auctioneers.

in the absence of such notice, settles with the principal, the agent's right of action is destroyed. (c) A policy-broker who effects a policy of insurance in his own name, as agent, at the same time declaring for whose use, benefit, or interest the same is made, is entitled to an action on the policy, inasmuch as, by the usage of trade, he has a lien upon it for the premium which is generally paid by the broker for his commission, and for the general balance due to him on the account between himself and his principal.

77. Repudiation of the contract by the principal.—When an agent has entered into a contract of sale for an unnamed and unknown principal, it is no defense to an action brought by the agent upon that contract, to say that the principal afterwards repudiated it. (d)¹

78. Pretended assumption of agency.—When a man has assumed to himself the character of an agent to another, whom he names as his principal, the law will not permit him to shift his situation, and bring an action as the principal and party really interested in the contract, without giving to the defendant previous notice of the situation in which he stands. Having misled the defendant by assuming a character and situation which did not belong to him, he is bound to undeceive him before bringing an action. (e) But, if the principal is not named on the face of the contract, the party professing to contract as agent for an unnamed principal is not precluded from saying at any time, "I am myself that principal," and from asserting his rights in that character. (f)

(c) *Coppin v. Walker*, 7 Taunt. 242.

(e) *Bickerton v. Burrell*, 5 M. & S. 383.

(d) *Short v. Spackman*, 2 B. & Ad. 962.

(f) *Rayner v. Grote*, 15 M. & W. 359.
(f) *Schmaltz v. Avery*, ante, p. 147.

See *ante*, p. 110, as to revocation of authority.

79. *Right of action of agents on contracts under seal.*—If the agent contracts under seal in his own name on behalf of his principal, he may sue upon the contract, although his representative character is disclosed on the face thereof; but, if the principal is made to covenant in his own name, and not the agent for him and in his behalf, the agent has then, of course, no right of action at all upon the contract.

80. *Liabilities of agents on simple contracts.*—Whenever an agent contracts in his own name for the fulfillment of a particular act or duty, without any qualification of his liability on the face of the contract, he is personally responsible for the fulfillment of the act undertaken to be done, although he was known to be acting only as an agent for some third party, (*g*) unless it was expressly agreed that he was not to incur any personal liability upon the contract. (*h*)¹ Where a person signs a contract in his own name without qualification, he is *prima facie* to be deemed to be a person contracting personally; and, in order to prevent this liability from attaching, it must be apparent from the other portions of the doc-

(*g*) *Reid v. Draper*, 6 H. & N. 813; (*h*) *Wake v. Harrop*, 30 L. J., Ex. 30; L. J., Ex. 268. 273; 31 L. J., Ex. 451.

¹ When the agency is not apparent on the face of the instrument. *Story on Agency*, § 147, note; *Minard v. Reed*, 7 Wend. 68; *Bank of North America v. Hoper*, 5 Gray, 567; and see *Bradlee v. Boston Glass Mfg.* 16 Pick. 347, *Savage v. Rix*, 9 N. H. 263; *Trask v. Roberts*, 1 B. Mon 201; *Stanton v. Camp*, 4 Barb. 274; *Stackpole v. Arnold*, 11 Mass. 27; *Bedford, &c., Ins. Co. v. Covell*, 8 Metc. 442; *Tip-pets v. Walker*, 4 Mass. 595; *White v. Spinner*, 13 John. 307, *Dusenbury v. Ellis*, 3 John's Cas. 70; *Hastings v. Lovering*, 2 Pick. 214; *Mills v. Hunt*, 20 Wend. 431; *Newhall v. Dunlap*, 2 Shepley, 280; *Rentz v. Stanton*, 10 Wend. 271; *Heuback v. Mollman*, 2 Duer, 260; *Sharp v. Emmett*, 5 Whart. 288; *Mott v. Hicks*, 1 Cow. 513, *Rheinhold v. Dertzell*, 1 Yeates, 39.

ument that he did not intend to bind himself as principal; (*i*) and the use of the words "as agent for" in the body of the contract does not prevent the liability of a party who signs as principal. (*j*)¹ So whenever in the body of a simple contract in writing, the agent contracts in his own name, and signs his name to the contract, he may render himself personally responsible for the fulfillment of the contract, although he declares that he contracts on behalf of a named principal, (*k*) or that he signs by procuration of, or as agent for, a named principal. (*l*)² If it appears from the general context of the written instrument that the agent himself was to be responsible for the due fulfillment of the contract, the words "for and on behalf," or "as agent for," will be deemed to be mere matter of description, and will not exempt the agent from personal liability; and there is no distinction in this respect between deeds and simple contracts. (*m*)³ Whether he is so liable depends upon the terms of the particular contract, construed in connection with the surrounding circumstances, and the relative situations of the parties at the time the contract was entered into. (*n*)⁴ If, on the face of

(*i*) *Thompson v. Davenport*, 2 Sm. Lead. Cas., 6th ed. p. 344.

(*j*) *Paice v. Walker*, L. R. 5 Ex. 173; 39 L. J. Ex. 109.

(*k*) *Parker v. Winlow*, 7 Ell. & Bl. 942; 27 L. J., Q. B. 49.

(*l*) *Lennard v. Robinson*, 5 Ell. & Bl. 126; 24 L. J., Q. B. 275.

(*m*) *Best, C. J., Norton v. Herron*, 1 C. & P. 648; Ry. & Mood. 231. *Tanner v. Christian*, 4 Ell. & Bl. 597; 24 L. J., Q. B. 91.

(*n*) *Downman v. Williams*, 7 Q. B. 103.

¹ See note 1, page 139.

² Id.

³ Id.

⁴ And see *Winsor v. Greggs*, 5 Cush. 210; *Mauri v. Hefferman*, 13 Johns. 58, 77; *James v. Bixby*, 11 Mass. 34, 37; *Bedford v. Jacobs*, 16 Martin, 530; *Brockway v. Allen*, 17 Wend.

the contract, there is an express disclaimer of personal liability on the part of the agent, effect will be given to such disclaimer, although the agent has contracted in his own name on behalf of an unnamed principal; but the agent must have had authority to enter into the contract on behalf of his principal, and must have intended to contract so as to bind the latter. (o)¹ Where an auctioneer subscribed a memorandum, indorsed on particulars of sale, to the following effect: "I, E. Driver, as agent for the vendor, hereby agree to sell to the above-named R. H. Gaby (the plaintiff) the lot thirty-eight referred to in the above memorandum," it was held that the auctioneer had not thereby engaged to be personally responsible for the making out of a good title to the estate. (p) So, where an auctioneer, as agent for the landowner, promised in his own name, on behalf of the landowner, that he (the auctioneer) would make out a title, and the agreement having been signed by the auctioneer and purchaser, the owner, with the knowledge and consent of the purchaser, afterwards added, "I hereby sanction this agreement, and approve of G. Lavender (the auctioneer) having signed the same on my behalf," to which ratification he appended his own signature, it was held that the agreement and ratification might be considered as one transaction, and that it manifested

(o) *Oglesby v. Iglesias*, Ell. Bl. & (p) *Gaby v. Driver*, 2 Y. & J. Ell. 930; 27 L. J., Q. B. 356. 555.

40, 43; *Hyde v. Wolf*, 4 Miller (La.) 234; *Taintor v. Prendergrast*, 3 Hill, 72; *Corlies v. Cumming*, 6 Cow. 181; *Rathbon v. Budlong*, 15 Johns. 1; *Baldwin v. Leonard*, 39 Vt. 266; *Wheeler v. Reed*, 36 Ill. 82; *Upton v. Gray*, 2 Greenl. 373; *McClellan v. Parker*, 27 Mo. 162; *Waing v. Mason*, 18 Wend. 425; *Mills v. Hunt*, 20 L. 431; *Raymond v. Crown, &c. Mills*, 2 Metc. 319.

¹ Id.

an understanding by all parties that the owner, and not the auctioneer, was to be liable upon the contract. (q) And, where goods were accepted by an agent under a bill of lading, which made them deliverable unto him "for the London Gas Company, or to his assignees, he or they paying freight for the said goods," and the defendant, on the delivery of the goods, promised to pay the freight, it was held that, as the defendant appeared, upon the face of the bill of lading, to be merely the agent of the London Gas Company, and had received the goods in that character, and not on his own account, the promise must be taken to have been made by him in his character of agent for the company, to pay the freight on their account, and was not a promise to be personally responsible for it. (r)

Whenever the agent contracts as agent, and signs his name, adding "as agent," or "by procuration," or signs the name of the principal, adding "by A B, as agent," and the principal is named in the body of the contract, it will require extremely strong words to control the effect of this form of signature, and render the party so signing personally responsible upon the contract. (s) Thus, where a charter-party of affreightment, not under seal, was expressed to be made between Jenkins of the one part, and Barnes of the other part, and contained divers stipulations between Barnes and Jenkins, and was signed Ralph Hutchinson for T. A. Barnes, and Hutchinson had no authority to sign for Barnes, it was held that Hutchinson could not be sued upon the contract,

(q) *Spittle v. Lavender*, 5 Moore, 270.

(r) *Amos v. Temperly*, 8 M. & W. 805.

(s) *Ceslandes v. Gregory*, 29 L. J., Q. B. 95; 30 *Id.* 36. *Green v. Kopke*, 18 C. B. 549. *Mahony v. Ke-kule*, 14 C. B. 390.

as his name did not appear therein as a contracting party. (*t*)

81. *Contracts by agents on behalf of foreign principals.*—When an English agent is contracting on behalf of a foreign principal, it will, in general, be presumed that the agent was intended to be responsible for the fulfillment of the contract. (*u*)¹ In such a case, both the agent and the principal are liable upon the contract; but the presumption of liability on the part of the agent may be rebutted by the form and terms of the contract. Thus, where a written contract was expressed to be made between V, a foreigner resident abroad, and the plaintiff, and the contract was merely signed by the defendant for V, the foreign principal; it was held that the defendant could not be sued upon the contract. (*x*)

82. *Undisclosed agencies.*—Whenever an agent enters into an agreement or undertaking, and neglects to declare the agency, and to qualify his liability upon the face of the contract, he is personally responsible, and is not permitted to show, through the medium of

(*t*) *Jenkins v. Hutchinson*, 13 Q. B. 405; 19 L. J., Q. B. 49. *Cooke v. 744*; 18 L. J., Q. B. 274. *Deslandes Wilson*, 1 C. B. N. S. 164.
v. Gregory, 2 El. & El. 602; 36 L. J., (*x*) *Mahony v. Kekulé*, 14 C. B. Q. B. 36. 390; 23 L. J., C. P. 54.

(*u*) *Wilson v. Zulueta*, 14 Q. B.

¹ The rule in the United States is the same, and agents or actors resident here and doing business as agents for principals resident in France, Germany, or other foreign countries, will be supposed to be trading upon their own responsibility and that credit is given to them, and not to their principals. Such rule, however, is capable of being rebutted by evidence of any peculiar circumstances of the case, varying the usages in this respect. *Story on Agency*, §§ 268, 290, 400; *Rogers v March*, 33 Me. 106; and see *Kirkpatrick v. Stainer*, 22 Wend. 244; *Taintor v. Prendergrast*, 3 Hill, 72, 73; *Leverick v. Meigs*, 1 Cow. 645, 663, 664; *Riard v. Taggard*, 5 Serg. & R 27; *Miller v. Lea*, 35 Md. 399.

oral evidence, that the other contracting party knew him to be merely an agent, and knew who his principal was, at the time he signed the contract.¹ Such evidence is admitted, as we have already seen, in order to enable a creditor to get at the real principal, and to charge him with the burthen of the performance of the contract; but it is never admitted for the purpose of discharging the agent from an agreement or undertaking which is absolute and unqualified upon the face of it, and in which the agent has thought fit to represent himself as the really contracting party. (y) Although brokers contract as such on the face of their bought and sold notes, yet, if they do not name their principals, they are, by the custom of some trades, liable to be treated as principals, and sued as such. (z) But, if an agent contracting on behalf of his principal has contracted in writing so as to render himself personally responsible upon the written contract, oral evidence is now admissible to show that, at the time the contract was entered into the plaintiff knew the defendant to be only an agent; that it was expressly agreed that he should not incur any personal liability upon the contract, and that the drawing up the agreement so as to make the defendant personally liable was the result of a mistake, and was contrary to the intention of the parties to the contract. (a)²

(y) *Higgins v. Senior*, 8 M. & W. 844. *Hanson v. Roberdeau*, Peake, 163. *Kendrar v. Hodgson*, 5 Esp. 228. *De Gelder v. Savory*, 2 Keb. 812. So by the French law, "Dans tous les engagements que le préposé contracte en son propre nom pour les affaires auxquelles il est préposé, il s'oblige comme débiteur principal, et il oblige en même temps son commet-

tant comme débiteur accessoire."—Poth. (Obl.), No. 448. *Gray v. Gutteridge*, 1 M. & R. 618. *Franklyn v. Lamond*, 16 L. J., C. P. 224; 4 C. B. 664.

(z) *Humfrey v. Dale*, 7 Ell. & B. 178; 26 L. J., Q. B. 138. *Fleet v. Murton*, L. R., 7 Q. B. 126; 41 L. J. Q. B. 49.

(a) *Wake v. Harrop*, 11 M. & W. 139.

¹ See *ante*, note 1, p. 139.

Id.

All bills of exchange and promissory notes signed by an agent, without any qualification of his liability, are binding upon the agent; and he cannot discharge himself from liability merely by showing that, at the time he accepted or endorsed the bill, or made the note, he was known to be merely an agent, having himself no interest in, and deriving no benefit from, the transaction. (b)¹

If an agent orders goods, or enters into dealings and transactions in his own name on behalf of an unknown or undisclosed principal, he is, of course, himself personally liable in respect of such transactions, unless the party with whom he has contracted has discovered the principal, and elected to charge him in preference to the agent. "If an auctioneer sells commodities without saying on whose behalf he sells them, the purchaser is entitled to look to him personally for the completion of the contract." (c) But, if the agent contracts, in his representative character, avowedly as agent, on behalf of a named or known principal, he is not personally responsible upon the contract, unless he has himself some special interest in the subject-matter of the contract, as presently mentioned and described. (cc) Wherever an order is given by one person for another, and he informs the tradesman who that person is for whose use the goods are ordered, he thereby declares himself to be merely an agent; and there is no foundation for holding him liable unless the goods come to his use in some shape or another. (d)²

(b) *Leadbitter v. Farrow*, 5 M. & S. 345. *Thomas v. Bishop*, 2 Str. 955. *Ex parte Buckley*, 14 M. & W. 469, overruling *Hall v. Smith*, 1 B. & C. 407.

(c) *Hanson v. Roberdeau, Peake*, 163. *Franklyn v. Lamonde*, 4 C. B. 644.

(cc) *Post*, p. 147-148.

(d) *Owen v. Gooch* 2 Esp. 568.

¹ *Ante*, note 2, p. 100.

² *Id.*

83. *Notoriety of agency.—Public officers.*—If a person is placed in a situation rendering his character of agent notorious, he cannot be made personally liable in respect of his dealings and transactions in the usual course of his employment. Thus, the surveyor of a turnpike road, in the employment of the commissioners for highways, is not personally liable to the laborers employed in the repair of the road for their wages, for the contract is, by implication of law, made with the commissioners. (*e*) Neither is the solicitor under a bankruptcy responsible to a messenger nominated by him for the amount of such messenger's "bill of fees," inasmuch as the messenger must be taken to be aware that the solicitor is not a principal in the transaction. (*f*) Neither can a witness who has been subpoenaed to give evidence in a cause conducted by an attorney, maintain an action against the latter for his expenses of attendance, as it is notorious that the attorney is a mere agent, and the witness knows that he attends to give evidence not for him but for his principal. (*g*) If, however, the agent himself has any interest in the subject-matter of the contract—if he acts for himself, as well as for third parties whom he professes to represent—he cannot escape from liability under a plea of agency. In such a case he is both principal and agent, and is responsible accordingly.

84. *Masters of ships*, being something more than mere agents, are personally responsible in respect of stores and necessaries furnished for the use of vessels under their command, and for repairs done by their orders, unless they expressly guard themselves from

(*e*) *Pochin v. Pawlew*, 1 W. Bl. 669. *Macgregor v. Deal & Dov., &c.*, 22 L. J., Q. B. 69.

(*f*) *Hartop v. Juckes*, 2 M. & S. 438. *Russell v. Reece*, 2 C. & K. 118. (*g*) *Robins v. Bridge*, 3 M. & W.

personal liability, and confine the credit to the owners of the vessel. (*h*) A separate action cannot be maintained against the master and the owner of a ship for the same identical cause of action. The creditor has an election to sue either the one or the other; but he cannot, after he has sued the one to judgment, maintain another action against the other. (*i*)

85. *Pretended agencies.*—When the agent contracts without authority from the principal on whose behalf he professes to act, the nature and extent of his liability will depend upon the nature and form of the contract. He cannot, as we have seen, be sued in any case upon the contract, if he has not contracted therein in his own name, although he may be liable to the plaintiff for warranting or representing himself to be an agent, and to have authority to make the contract, when he is not the agent and had no such authority; (*k*) provided the misrepresentation was a misrepresentation of fact and not merely of law. (*l*) A person who contracts in his own name on behalf of another, but who is really a principal, cannot shelter himself from responsibility by describing himself, on the face of the contract, as an agent, and providing that he shall not be personally responsible. (*m*) Where a contract is signed by one who professes to be signing as agent, but who has no principal existing at the time

(*h*) *Rich v. Coe*, 2 Cowp. 639.
 (*i*) *Priestly v. Fernie*, 34 L. J., Ex.
 173.
 (*k*) *Collen v. Wright*, 8 Ell. & Bl.
 647; 27 L. J., Q. B. 217. *Simons v.*
Patchett, 26 L. J., Q. B. 195. *Pow*
v. Davis, 30 Id. Q. B. 257. *Hughes v.*
Græme, 34 L. J. Q. B. 335. *Cherry*
v. Bank of Australasia, L. R., 3 P. C.
 24; 38 L. J., P. C. 49. *Richardson v.*

Williamson, L. R., 6 Q. B. 276; 40 L.
 J., Q. B. 149. *Weeks v. Propert*, L.
 R., 8 C. P. 427.

(*l*) *Rashdall v. Ford*, L. R., 2 Eq.
 750; 35 L. J., Ch. 769. *Beattie v.*
Lord Ebury, L. R., 7 Ch. 777; 41 L.
 J., Ch. 804.

(*m*) *Schmalz v. Avery*, 20 L. J. Q.
 B. 229.

¹ See *ante*, pages 123, 124, 125.

and the contract would be wholly inoperative unless binding upon the person who signed it, he is personally liable on it, and a stranger cannot by a subsequent ratification relieve him from that liability. (*n*)¹ If the acceptor of a bill of exchange professes to accept per procuration as agent, he is responsible upon the bill, if he was himself the principal, and acted without the authority of the party on whose account he professed to act. (*o*) But the burthen of proving that the party describing himself on the face of the contract as agent is in truth the principal, falls upon the plaintiff seeking to falsify the contract and to show that the defendant assumed a false position. (*p*)

86. *Contracts by the agents of irresponsible principals.—Government agents.*—If the other contracting party chooses to give credit to a known irresponsible principal, acting through the medium of an agent, taking his chance of payment from such principal, the agent will not, in such a case, be liable upon the contract. (*q*) If the agent acts in a public employment, and the extent of his authority is as much known to the party contracting with the agent as to the agent himself, and it is manifest that the former intended to rely on the subsequent ratification of the contract by the principal, and was not led into the contract by any misstatement or misrepresentation on the part of the agent respecting his authority in the matter, the agent will not incur any personal liability. Thus the governor of a fort, or of a colony, is not personally answerable

(*n*) *Kelner v. Baxter*, L. R., 2 C. P. 174; 36 L. J. C. P. 94.

(*o*) *Owen v. Van Uster*, 10 C. B. 324.

(*p*) *Carr v. Jackson*, 21 L. J., Ex.

137; 7 Exch. 382.

(*q*) *Lewis v. Nicholson*, 18 Q. B. 503; 21 L. J., Q. B. 311. *Wake v.*

Harrop, 30 L. J., Ex. 273; 31 Id.

451.

¹ *Ante*, note 2, p. 100.

for stores ordered by him for the use of government; neither is a military commissary, nor the captain of a troop, liable for forage supplied to the army or to the troop, nor for provisions furnished to the men; nor is the first Lord of the Treasury personally answerable for the expenses incurred by a person employed in raising a regiment for the service of government; (r) nor is the Secretary of War liable to a retired clerk of the War-office for his retired allowance, although such allowance was included in the yearly estimates drawn for by such secretary, and received by him as applicable to such specific allowance, there being no duty from which the law will imply a promise from the secretary, who is the agent and officer of the crown, and responsible only to the crown for the due execution of the trust committed to him. (s) In all these cases, the nature and extent of the agent's authority are as much known to the party with whom he contracts as to the agent himself; and it is obvious that in these public transactions the individual credit of the agent is not intended to be pledged, but that the parties who contract with him rely on the honor and good faith of the irresponsible principal.

The clerk of the County Court, giving orders for the fitting up of a building for the holding of the sittings of the court, is not a public officer acting in a public employment, so as to be exonerated from liability in respect of the orders so given. (t)¹

(r) *Rice v. Chute*, 1 East, 579.
Myrtle v. Beaver, Id. 135. *Macbeth*
v. Halidmand, 1 T. R. 180.

(s) *Gidley v. Lord Palmerston*, 3
Moore, 91.

(t) *Autey v. Hutchinson*, 17 L. J.,
 C. P. 304.

¹ In the United States, a similar rule prevails. An agent contracting in behalf of the government, is not personally bound by the same (*Brown v. Austin*, 1 Mass. 208; *Dawes v. Jackson*, 9 Id. 490; *Hummarskold v. Bull*, 11 Rich. 493).

87. Money received by agents for the principal.—

If money be paid to a known agent for the use of his principal, an action for money had and received **cannot** be sustained against the agent, if it appears that the principal has the least color of right to the money; for the courts will not try the right of the principal to

Walker v. Swartwout, 12 Johns. 444; Nichols v. Moody, 22 Barb. 611; Ogden v. Raymond, 22 Conn. 379; Ghent v. Adams, 2 Kelly, 214; Copes v. Matthews, 10 Sm. & Mar. 398; Miller v. Ford, 4 Rich. 376; Dwinelle v. Henriquez, 1 Cai. 387; Parks v. Ross, 11 How. 362; Bainbridge v. Downie, 6 Mass. 253; Fox v. Drake, 8 Cow. 191; Osborne v. Kerr, 12 Wend. 17; Jones v. La Tombe, 3 Dall. 384; Tult v. Hobbs, 17 Me. 486; Enloe v. Hall, 1 Humph. 303; Rathbon v. Budlong, 15 Johns. 1; Mott v. Hicks, 1 Cow. 513; Bernard v. Torrance, 5 Gill. & J. 383; Hodgson v. Dexter, 1 Cranch. 345, 363, 364; Sheffield v. Watson, 3 Cai. 69; Bronson v. Woolsey, 17 John. 46). The presumption is that the contract was made for the benefit of the government (Crowell v. Crispin, 4 Daly (N. Y.) 100); and so any suit upon such contract must be brought in the name, not of the agent, but of the government (Irish v. Webster, 5 Greenl. 171; Bainbridge v. Downie, 6 Mass. 253). A personal responsibility on the part of the agent, however, if proved, is always admissible to rebut this presumption (Johnson v. Common Council, &c. 16 Ind. 227; Sanborn v. Neal, 4 Miss. 126); as, for instance, if the agent did not disclose that he was acting for the government (Swift v. Hopkins, 13 John. 313; and see Gill v. Brown, 12 Id. 385; Freeman v. Otis, 9 Mass. 272; Dawes v. Jackson, Id. 490; Osborne v. Kerr, 21 Wend. 179; Belknap v. Reinhart, 2 Id. 375; Fox v. Drake, 8 Cow. 191; Walker v. Swartwout, 12 Johns. 444, 448; Brown v. Rundlett, 15 N. H. 360; Hammerskold v. Ball, 9 Rich. 484). It is the duty of those dealing with public agents to inquire as to their authority (Story on Cont. § 307 a); and a public statute limiting the amount of an expenditure, is notice in law to one contracting with a government agent (Curtis v. United States, 2 Nott & Hun. 144; Bakimore v. Reynolds, 2 Md. 1; State v. Hastings, 2 Wis. 518; Hall v. County of Marshall, 12 Iowa, 142); and if a public agent acting publicly omit to sign his name with his official designation, he is not, on that account, personally liable (Lym v. Adamson, 7 Clark (Iowa) 509). But the government is not bound by the contracts of its agents, unless it

the money in an action against the agent. (u) The agent having received the money on behalf of the principal, and for his use, is accountable to the latter for it. The maxim *respondeat superior*, therefore, applies; and the agent, whether he has paid over the money, or whether he has not, is answerable to the principal alone. (x) But, if the payment to the agent is void *ab initio*, so that the money never was received by him for the use of his principal, and he is consequently not accountable to the latter for it, he is bound to refund the amount, if he has not actually paid it

(u) *Sadler v. Evans*, 4 Burr. 282, n. *Stephens v. Badcock*, 3 B. & 1985. *Greenward v. Hurd*, 4 T. R. Ad. 354. *Bamford v. Shuttleworth*, 553. 11 Ad. & E. 926. *White v. Bartlett*,

(x) *Dixon v. Hamond*, 2 B. & Aid. 9 Bing. 378; 2 M. & Sc. 520. *Goodall v. Lowndes*, 6 Q. B. 464.

unmistakably appear that they are acting strictly within their authority. The difference between the laws regulating government and other agents, is that private principals are liable to the extent of the power they have apparently given to their agents, while the government is only bound by the power it has actually given to its officers and agents. *Pierce v. United States*, 4 Nott & Hun. 279; *The Floyd Acceptances*, 7 Wall. 666; *State v. Hayes*, 52 Mo. 578; and see *Grant v. United States*, 5 Nott & Hun. 71; *Ives v. Hulett*, 12 Vt. 314.

The same rules apply whether the contract made by the government agent is one *parol* or under seal (*Stinchfield v. Little*, 1 Greenl. 231; *Hodgson v. Dexter*, 1 Cranch. 345, 363, 364; *Osborne v. Kerr*, 12 Wend. 179; *Walker v. Swartwout*, 12 Johns. 444; and see *Hodges v. Runyan*, 30 Mo. 491), where the principle was held to apply to a note given by one signing himself as "trustee," on behalf of the trustees of a school district; and where public officers, contracting for a public purpose, afterwards had a settlement with the other contracting party, and gave a promise in writing to pay upon a certain day, which they signed, it was held that there was no intention on their part to incur a personal responsibility, but only to apply to the settlement such public funds as might be in their hands, on the day mentioned (*Fox v. Drake*, 8 Cow. 191). But they might be personally liable, if they had such public funds in their hands. *Id.*

over, or settled for it in account with his principal, at the time he receives notice of the mistake. Thus, if money, through a mistake of fact, is paid to an agent, and placed by him to the account of his principal, but not paid over, an action lies against him for the recovery of the money; and the mere passing such money in account, making rests without any new credit given, fresh bills accepted, or further sum advanced to the principal in consequence of it, is not equivalent to a payment of it over. (y) But, if he has paid it over or settled for it in account with his principal, he cannot be compelled to refund it. (z) If, however, he misleads the plaintiff by giving him to understand that he has not paid over the money, and thereby induces the plaintiff to sue him for its recovery, he is then precluded from insisting on the defense of payment over. (a)

88. Money wrongfully and illegally received by agents.—The doctrine that the receipt of the agent is the receipt of the principal does not extend to the case of a wrong-doer, so that, if an agent gets money into his hands by his own fraudulent or illegal act, he cannot discharge himself from liability by paying it over to his principal. (b) Thus, where an attorney brought an action and recovered a sum of money on the retainer of a man who professed to act under a power of attorney from the party really entitled, but which power of attorney was forged, and an action was brought against the attorney for the recovery of this money, it was held that the fact of his having paid

(y) Buller v. Harrison, 2 Cowp. 565. 32 L. J., Q. B., 297. Shand v. Grant, 15 C. B., N. S. 324.
 Bishop v. Eagle, 10 Mod. 23. Cox v. Prentice, 3 M. & S. 344. Horsfall v. Handley, 2 Moore. 5 : 8 Taunt. 136. 816.
 Holland v. Russell, 30 L. J., Q. B. 312. Newall v. Tomlinson, L. R., 6 C. P. 405.
 (z) Holland v. Russell, 4 B. & S. 14 ; 1 Selw. N. P. 90, n.
 (a) Edwards v. Hodding, 5 Taunt. 816.
 (b) Townson v. Wilson, 1 Campb. 397. Anon., Id., 398 n. Clark v. Johnson, 3 Bing. 426. Miller v. Aria, 1 Selw. N. P. 90, n.

it over to his false employer constituted no answer to the action. (c) If an agent obtains money in the name of his principal by fraud, extortion, or deceit, as, for example, if he detains goods which he has no right to detain, and compels the owner to pay him money as the price of their restitution, he cannot shelter himself from responsibility on the ground that he is an agent.¹ "A payment to A, expressly as the agent of B, for the purpose of redeeming goods wrongfully detained by B, and a receipt by A expressly for B, will still give a right of action against A for money had and received." (d) Where a bailiff illegally compelled the plaintiff, under a threat of distraining his goods, to pay him a sum of money; it was held that the fact of the bailiff's having, before the commencement of the action, paid over the entire sum to the sheriff, who had paid it into the exchequer, constituted no defense to the action. (e) If a party acts as an agent in collecting the assets of a deceased person, and knows, at the time, that his employer is not the legal personal representative, he is himself liable as executor de son tort, and is responsible for the money he has received, although he may have duly accounted with his principal, and paid it over to him. (f) If an agent sells goods with a full knowledge that he has no right to sell, and conceals that fact from the buyer, he is liable to the latter in an action for the deceit, although before action brought he has paid over the price. (g)

(c) *Robson v. Eaton*, 1 T. R. see *Holland v. Russell*, ante, p. 62. 152.

(d) *Smith v. Sleep*, 12 M. & W. 588.

Wakefield v. Newbon, 6 Q. B. 276.

Ashmole v. Wainwright, 2 Id. 827.

Oates v. Hudson, 6 Exch. 346. And

(e) *Snowden v. Davis*, 1 Taunt. 359.

Lovell v. Simpson, 3 Esp. 153.

(f) *Sharland v. Mildon*, 10 Jur. 772.

(g) *Peto v. Blades*, 5 Taunt. 657.

¹ The agent and not the principal is liable for willful and wrongful acts. So where an agent entrusted to loan money

89. *Receipt of money by agents to be paid over to a stranger.*—The mere circumstance of money having been paid by a principal to his agent, with directions to pay it to a third person, imposes, as we have already seen, (*h*) no liability upon the agent to such third person, unless there is an express or implied assent, on the part of the agent, to pay the money according to the directions he has received; and the mere receipt of the money by the agent, is no evidence of an implied assent to apply it to the purposes for which it was professedly remitted to him. He holds the money for the use of the remitter; the privity of contract is between him and his principal, and not between the agent and such third party, until by some act done, or by some engagement entered into with the person who is the object of the remittance, the agent has consented to appropriate the money to his use. (*i*)¹

90. *Liabilities of agents on contracts under seal.*—The liability in the case of deeds is always confined to the person who has contracted therein, in his own name, and who has sealed and delivered the deed; and does not extend to the person on whose behalf, and for whose benefit, the contract is expressed to be made. When, therefore, an individual acting in a private capacity, and not on behalf of the government, covenants in his own name, under his own hand and seal, for the act of another, he is personally bound by his

(*h*) Ante, p. 59.

Hill v. Royds, L. R., 8 Eq. 290; 38 L.

(*i*) Moore v. Bushell, 27 L. J., Ex. 3. J., Ch. 538.

for a principal extorted a usurious rate of interest, it was held to be no usury on the part of the principal (*Condit v. Baldwin*, 21 N. Y. 219). No contract can be valid which stipulate: to exempt agents from responsibility for unlawful acts. Story on Agency, § 234. But see *Hughes v. Bogn*, 9 Watts, 556. Story on Agency, § 453.

¹ See *post*, book ii. ch. viii. part 3, Money Received.

covenant, although he describes himself in the deed as covenanting "for and on the part and behalf" of such other person; for "a man may bind himself for the act of another, and to pay out of a fund not his own, and will be liable in either case." (*j*) A proviso totally inconsistent with any personal liability, where no fund is pointed out or provided for the payment of the money, has been held to be repugnant and void; (*k*) but it has also been held that an agent may contract for a principal on the express terms that he is himself to incur no personal liability, whether the principal is, or is not, bound by the contract. (*kk*)

91. *Exemption of public officers.*—When, upon the face of a contract under seal, it appears that the covenantor is an officer acting in a public capacity in discharge of his duty to the crown or the country, he is not personally liable for the fulfillment of the contract, unless he gives his own undertaking, and it plainly appears to have been the intention of the contracting parties that he should himself be responsible for the performance of the act covenanted to be done; for it would be detrimental to the public service to hold that governors and commanders-in-chief were personally responsible upon contracts entered into by them in the execution of their duty, unless the intention of the contracting parties that they should be liable was plainly manifested upon the face of the contract. (*m*)¹

92. *Execution of deeds by agents not rendering them*

(*j*) *Appleton v. Binks*, 5 East, 148.
Talbot v. Godbolt, Yelv. 137; 5 Bacon's Abr. 372. *Hancock v. Hodgson*, 12 Moore, 504.

(*k*) *Furnivall v. Coombes*, 6 Sc. N. R. 536.

(*kk*) *Wake v. Harrop*, 6 H. & N. 768; 30 L. J., Ex. 273 app. 1 H. & C. 202 31 L. J. 451.

(*l*) *Wake v. Harrop*, 30 L. J., Ex. 273; 31 Id., 451. *Unwin v. Wolseley*, 1 T. R. 674. *Allen v. Waldegrave*, 2 Moore, 623.

¹ See *ante*, note 1, p. 151.

personally liable.—There is a wide distinction between entering into a deed for and on behalf of another, and merely executing it in his behalf. If an agent is duly authorized by power of attorney under seal to enter into and execute a deed for his principal, and the principal is made to contract in his own name, and the agent merely executes the deed for him, the principal, and not the agent, is bound by the execution of the deed. In such a case it is usual to denote by some form of words that the deed is executed by an agent on behalf of the principal; the agent either signs his own name, adding “for B” (the principal), or he signs the name of B, adding “by A, his attorney.” When the principal himself is made to covenant, and the agent appears merely as the executing party, if the agent has not an authority under seal to warrant his acts, there is no binding contract at all; the principal cannot be bound, as he has not legally sanctioned the contract, and the agent cannot be made liable upon it, as he has not contracted in his own name.

93. *Of the rights of partners upon contracts with third parties.*—If a contract is entered into with one partner in his individual capacity, and apparently on his own account, but in reality on behalf of the firm of which he is a member, and the joint interest and joint consideration are not disclosed upon the face of the writing, the partner so contracting stands in the position of an agent dealing on behalf of an undisclosed principal; and either the partner with whom the contract is so made, or the firm, as the parties really interested in it, may enforce it, (m) the defendant being entitled in the latter case, to set up against the firm any defense that he would have had to an action

(m) *Alexander v. Barker*, 2 Tyr. 147; 2 Cr. & J. 133.

brought by the one partner alone. (*n*) Thus, if a written contract for the sale of goods, the joint property of several partners, be entered into by one of them in his own name only, all the partners may enforce it, although the purchaser had at the time no knowledge that there were other persons interested in the transaction besides the one he had contracted with. (*o*)¹

(*n*) *Stracey v. Deey*, 7 T. R. 361, n. (*o*) *Skinner v. Stocks*, 4 B. & Ald. Gordon v. Ellis, 13 L. J., C. P. 179; 2 437. C. B. 821.

¹ Partners are mutual agents of each other, in all things which respect a partnership business, and the act of one, in such things, is the act of an agent of all. The principles of law governing partners, are in general the same as those governing any other species of agency. A partner may bind the firm by proceedings of which the other partners are ignorant (*Chemung, &c. Bank v. Bradner*, 44 N. Y. 680; *Hunt v. Chapin*, 6 Lans. 139). Except that a partner cannot bind the other partners by an instrument under seal, unless he have an authority under seal to do so, as any other agent might and must have (*Story on Partnership*, §§ 1, 117, 123; but see *Cady v. Shepherd*, 11 Pick. 400). Or the deed must be executed by him in presence of the other partners (*Story on Partnership*, §§ 117, 123, and cases cited). An act of Congress, of 1823, ch. 149, § 25, authorized a partner to bind the firm in bonds given for duties by the U. S. Custom House; and see as to power of partner to bind co-partners by deed: *Gibson v. Warden*, 14 Wall. 244; *Baldwin v. Richardson*, 33 Tex. 16. By seal when not essential (*Hoskinson v. Eliot*, 62 Pa. St. 393; *Schmertz v. Shreeve*, Id. 457). By making negotiable paper (*Ulery v. Ginrich*, 57 Ill. 531; *Hunt v. Chapin*, 6 Lans. 139; *Moore v. Lackman*, 52 Mo. 323; *Taylor v. Hill*, 36 Ma. 494; *Hayes v. Baxter*, 65 Barb. 181; *Potter v. Price*, 3 Pitts. (Pa.) 136; *Barrett v. Russel*, 45 Vt. 43; *Smith v. Hill*, Id. 90; *McClelland v. Remsen*, 3 Abb. (N.Y.) Ct. App. Dec. 74; *Morrison v. Mendenhall*, 18 Minn. 232; *Bacon v. Hutchings*, 5 Bush. (Ky.) 595; *Hendric v. Berkowitz*, 37 Cal. 113; *Carter v. Pomeroy*, 30 Ind. 438; *Succession of Dohlonde*, 21 La. Ann. 3; *Camp v. Page*, 42 Vt. 739; *Kellogg v. Fancher*, 23 Wis. 21; *Crocker v. Colwell*, 46 N. Y. 212; *Gelchett v. Foster*, 106 Mass. 42; *Shaw v. McGregory*, 105 Mass. 96; *Faler v. Jordan*, 44 Miss. 383; *Sylverstein v. Atkinson*, 45 Id. 81; *Ross v. Whitfield*, 1 Sweeny (N.Y.) 318; *Chemung*,

94. Implied contracts and promises with firms in partnership.—If a service or benefit, in respect of which the law implies a promise, moves from a firm in partnership, the promise is a joint promise in favor of all the partners. (*p*) If, on the other hand, it moves from one partner separately and individually on his own account, it is a private contract in which the partnership has no concern. (*q*) Whenever the services have been rendered by the one partner on the partnership account, and the remuneration for such services

(*p*) *Bond v. Pittard*, 3 M. & W. 357. (*q*) *Brandon v. Hubbard*, 4 Moore Lambert's case, Godb. 244. 367.

&c. *Bank v. Bradner*, 44 N. Y. 680; *Lime Rock, &c. Ins. Co. v. Treat*, 58 Me. 415; *National Bank v. Ingraham*, 58 Barb. 290; *McElroy v. McLearn*, 7 Coldw. 146). And as to the authority, generally, see *Wolf v. Mills*, 56 Ill. 360; *Chambers v. Clearwater, Abb.* (N. Y.) App. Dec. 341; *Cockroft v. Claflin*, 64 Barb. 464; *Easter v. Farmers' Bank*, 57 Ill. 215; *Hyams v. Rodgers*, 24 La. Ann. 230; *Draper v. Moore*, 2 Cin. (Ohio) 167; *Morrison v. Mendenhall*, 18 Minn. 232; *Dunnel v. Henderson*, 23 N. J. Eq. 174. *Shelmire's Appeal*, 70 Pa. St. 285; *Davis v. Richardson*, 45 Miss. 499; *Reyer v. Aydelotte*, 1 Cinc. (Ohio) 81; *Dupree v. Boyd*, 23 La. Ann. 495; *Bodwell v. Eastman*, 106 Mass. 525; *National Bank v. Thomas*, 47 N. Y. 15; *Stokes v. Stevens*, 40 Cal. 391; *McFayden v. Harrington*, 67 N. C. 20; *O'Brien v. Vantine*, 1 Pa. Law Journ. Rep. 210; *Barker v. Mann*, 5 Bush. (Ky.) 672; *Thomas v. Green*, 30 Md. 1; *Hopkins v. Carr*, 31 Ind. 260; *Crown v. Fitch*, 33 N. J. L. (4 Vr.) 418; *Bankhead v. Alloway*, 6 Coldw. (Tenn.) 56; *Adee v. Demorest*, 54 Barb. 433; *Hoskinsen v. Eliot*, 62 Pa. St. 393; *Mead v. Shepard*, 54 Barb. 474; *Williams v. Roberts*, 6 Coldw. (Tenn.) 493; *Roberts v. Shepard*, 2 Daly, 110; *National Bank v. Sackett*, 2 Id. 395; *Huhn v. St. Clair Savings, &c. Co.* 50 Ill. 486; *Bryant v. Hawkins*, 47 Mo. 410; *Nichols v. English*, 3 Brews. (Pa.) 260. *Succession of Orick*, 22 La. Ann. 501; *Illinois, &c. R. R. Co. v. Owens*, 53 Ill. 391; *Pollock v. Williams*, 42 Miss. 88; *Kedder v. Page*, 48 N. H. 380; *Hawkins v. Hastings Bank*, 1 Dill. 462; *Chipley v. Keaton*, 65 N. C. 534; *Comstock v. Buchannan*, 57 Barb. 127; *McGregor v. Ellis*, 2 Disney (Ohio) 286; *Graves v. Hall*, 32 Tex. 665; *Van Brunt v. Applegate*, 44 N. Y. 544; *Bowin v. Sutherlin*, 44 Ala. 278.

belongs to the joint purse, all the partners are jointly interested in the consideration. (r) When the money of the partnership has been lent by the one partner alone, there is an implied promise of repayment in favor of all the partners; (s) but, if they permit one partner to deal with the partnership property in his own name, as the sole owner of it, or as the sole party interested, they cannot stand in a better situation than the one partner who has been permitted so to act. (t) And, when one party lends money in his own name, and nominally on his own account, but really on account of, and as the loan of, the firm, the firm, if it sues for the money, must show clearly and distinctly that the advance was made on its account, and as a loan from the partnership, although the fact might at the time be unknown to the borrower; for, as we have before seen, "if B lends money to A, and A makes a further loan of it to C, B would have no right of action against C to recover it back." (u)

95. *Trust services by partners.*—If one of the partners is a trustee, and work is done by the firm in the execution of the trust, the firm cannot charge for their trouble and services. (x)

96. *Contracts with the trustees or directors of copartnerships.*—In order to obviate the inconvenience arising from deaths and changes in a firm, when a large number of persons are associated together in partnership, recourse has been had to trustees, who have been appointed to conduct the business of copartnerships, and enter into contracts for the general benefit of the concern. (y) When a number of persons are asso-

(r) *Arden v. Tucker*, 4 B. & Ad. 815.(s) *Alexander v. Barker*, 2 C. & J.

139.

(t) *Lucas v. De la Cour*, 1 M. & S.249. *Gordon v. Ellis*, 2 C. B. 821; 13L. J., C. P. 182. *Robson v. Drummond*, 2 B. & Ad. 303.(u) *Sims v. Bond*, 5 B. & Ad. 389.(x) *Mathison v. Clark*, 18 Jur. 1020.(y) *Metcalf v. Bruin*, 12 East, 404—

ciated together in partnership in this manner, the trustees have the general conduct and management of the copartnership, and form the acting partners of the concern, whilst the others contribute merely their capital, and receive accruing profits in proportion to their interests, and stand, consequently, in the position of dormant partners. All simple contracts entered into with the copartnership by name, or with one or more of the trustees, are, in contemplation of law, entered into with all of them jointly, as the acting partners performing the ostensible acts of the copartnership. (2) They are also, as the acting partners, jointly interested in all implied contracts arising out of partnership transactions. (a)¹

97. *Liabilities of partners upon simple contracts.*—Each member of a complete partnership is liable for himself, and as agent for the rest binds them, upon all contracts made in the ordinary course of the business of the copartnership. (b) Where partners simply

406. *Clay v. Southern*, 21 L. J., Ex. 302; 7 Exch. 717.

(a) *Phelps v. Lyle*, 10 Ad. & E. 113.

(a) *Lefevre v. Boyle*, 3 B. & Ad. 880. *Meggison v. Harper*, 2 C. & M. 322.

(b) *I.d. Wensleydale, Ernest v. Nicholls*, 6 H. L. C. 418. *Cox v.*

¹ And so as to the question of the continued liability of a retiring partner for money applied to partnership uses, with the knowledge of the partners, by one of the partners, who had the money in possession as trust money, . . . this is to all intents a borrowing of money by the firm (*Parsons on Partnership*, p. 426; and see *Harper v. Lamping*, 33 Cal. 641). As to trust moneys applied to firm uses, see *Jacques v. Marquand*, 6 Cow. 497; *Hutchinson v. Smith*, 7 Paige, 26; *Richardson v. French*, 7 Metc. 557. Where a member of a firm holding funds, as the agent of another, puts that money into the business, the firm has been held to be liable, whether the other partners knew that he held the money as agent or not. *Lloyd v. Wallace*, 31 Ga. 688; *Harper v. Lamping*, 33 Cal. 641; *Whitaker v. Brown*, 16 Wend. 509.

agree to carry on a partnership of which the term is not fixed, one of those partners has no authority to take a lease so as to bind the others. (c) But every one of the partners in a general trading partnership is, in contemplation of law, in the absence of any known controlling stipulation between them, clothed with an implied authority to enter into simple contracts on behalf of the firm in furtherance of the ordinary business of the copartnership, and to use the trading name of the firm in all such contracts and in all dealings and transactions in respect of which partners in such trade usually have authority to bind one another; and each of the partners is individually liable for the performance of such contracts in the same manner as if they had been entered into personally by himself. (d) But this implied general authority is confined to general partnerships in trade, where the partners are jointly interested in the capital stock of the business, as well as in the profits accruing therefrom, and does not extend to partnerships in particular transactions, or to limited partnerships in profits, where the partner has no interest in the capital stock. Thus, where an author and publisher agree to publish a work for their mutual profit, upon the understanding that the author is to write the book, and the publisher to print and publish it at his own expense, there is no implied authority from the author to the publisher to contract for the supply of paper, or for the printing, or for any other matter necessary for the publication of the work, so as to render the author responsible for the price of the paper, or for printing, or advertisements, or anything

Hickman, 9 C. B. N. S. 99; 8 H. L. C. 268; 30 L. J., C. P. 125. Kilshaw v. Jukes, 3 R. & S. 847; 32 L. J., Q. B. 320. (c) Sharp v. Milligan, 22 Bea. 610. (d) Poth. Obl. No. 83.

else ordered by the publisher for the purposes of the publication. (e)

Where several coach-proprietors agree to undertake the carriage of passengers and parcels on a certain line of road for their mutual profit, and divide the road into districts, and each proprietor horses and conveys the coach over his own district, finding his own horses harness, and servants, stables, hay, straw, and horse keepers for the execution of his share of the undertaking, one has no authority to bind the others by contracts for the employment of servants, or for the purchase of horses, hay, straw, or any other thing necessary for the carriage of the passengers. (f)¹ But

(e) *Wilson v. Whitehead*, 10 M. & W. 503. (f) *Barton v. Hanson*, 2 Taunt. 49.

¹ There is nothing in the nature or essence of a partnership requiring it to be confined to ordinary trade and commerce, or to dealings in personal property. Partnerships may exist between conveyancers, attorneys, mechanics, owners of a line of stage-coaches, artisans, or farmers, as well as between merchants and bankers, or the relation may exist between dealers and speculators in real estate (*Chester v. Dickinson*, 45 How. (N. Y.) Pr. 325; and see *Ruddick v. Otis*, 33 Iowa, 402; *Tyler v. Scott*, 45 Vt. 261; *Hawkins v. McIntyre*, 43 Vt. 496; *Gillbank v. Stephenson*, 31 Wis. 592; *Musier v. Trumpour*, 5 Wend. 274). And as to what will not constitute a partnership, see *Donley v. Hall*, 7 Bush. (Ky.) 549; *Edwards v. Tracy*, 62 Pa. St. 374; *Christian v. Crocker*, 25 Ark. 327; *Lintne's v. Millikin*, 47 Ill. 178; *Phillips v. Phillips*, 49 Id. 437; *Freese v. Ideson*, 49 Id. 197; *Howe v. Howe*, 99 Mass. 71; *Hill v. Brazill*, 27 Iowa, 131; *Richter v. Poppenhusen*, 39 How. (N. Y.) Pr. 82; *Hathaway v. Brunkley*, 42 Ga. 226; *Haskins v. Burr*, 105 Mass. 48; *Haile v. York*, 27 Wis. 209. Voluntary associations, such as clubs for social or charitable purposes, are not partnerships (*Cheaney v. Clark*, 3 Vt. 431). Nor persons who subscribe in writing certain sums for the purpose of building a meeting-house, which when completed is to be the property of the subscribers, in proportion to the sums subscribed (*Woodward v. Cowing*, 41 Me. 1). The mem-

they are each clothed with an implied authority to enter into all customary and reasonable contracts with the passengers for their conveyance; and all, consequently, may be bound thereby; (*g*) and, if one of them, whose business it is to hire coaches, contracts with a coachmaker for the supply of coaches to run throughout along the whole line of road, and not merely for his particular district, this is a contract with the whole partnership, and all are jointly responsible upon it. (*h*)

98. *Who may be made liable as partners.*—Where a person is sought to be made liable on the ground of his being a partner, the true test is whether or not he has constituted the other alleged partner his agent in respect of the partnership business. A participation in the profits, though cogent, is not conclusive evidence of a partnership. (*i*)¹ And it is now established that,

(*g*) *Helsby v. Mears*, 8 D. & R. C. P. 125. *Killshaw v. Jukes*, 3 B. & S. 847; 32 L. J., Q. B. 217. *Bullen*

(*h*) *Arthur v. Dale*, Collyer Part., v. Sharp, L. R. I. C. P. 86; 35 L. J., C. P. 105. *Eng. & Ir. Church &*

(*i*) *Wheatcroft v. Hickman*, 9 C. B., University Ass. Soc., in re, 1 H. & M. N. S. 47; 8 H. L. C. 268; 30 L. J., 85.

bers of a telegraph company are not partners, but only tenants in common. *Irvine v. Forbes*, 11 Barb. 587; and see *Fay v. Noble*, 7 Cush. 188.

¹ There is no partnership without a joint transaction, without a lawful and valid agreement to share in some joint enterprise, or some joint benefits received (*Parsons on Partnership*, p. 6; *Atkins v. Hunt*, 14 N. H. 205; *Goddard v. Pratt*, 16 Pick. 412; *McGraw v. Pulling*, 1 Freem. Ch. 357; *Bird v. Hamilton*, Walker, Ch. 361; *Smith v. Burnham*, 3 Sumner, 435). And see further as to what will constitute a partnership, *Dwinell v. Stone*, 30 Me. 384; *Terrell v. Richards*, 1 Nott & Mc. 20; *Everett v. Chapman*, 6 Conn. 347; *Doggett v. Jordan*, 2 Fla. 541; *Drake v. Elwyn*, 1 Cai. 184; *Beecham v. Dodd*, 3 Harrington (Del.) 485; *Chapman v. Wilson*, 1 Rob. (Va.) 267; *President, &c. v. Rice*, 2 Allen, 480; *Moody v. Rathburn*, 7 Minn. 89; *Cook v. Carpenter*, 34 Vt. 121; *Williams v. But*

although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where, from such perception alone, it may, as a presumption, not of law but of fact, be inferred; yet, that whether that relation does or does not exist, must depend on the real intention and contract of the parties. (*k*) Thus, an assignment to trustees for the benefit of creditors, upon trust to divide the profits of the business amongst the creditors in reduction of their debts, does not render the creditors who execute the deed and participate in the profits responsible to third parties as partners. (*l*) "The law as to partnership," says Lord Wensleydale, "is a branch of the law of principal and agent. A partner embraces both characters; and, where a man orders another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, he is the principal, and the person so employed is the agent, and the principal is liable for the agent's contracts. This is

(*k*) *Mollwo, March & Co. v. The Court of Wards, L. R., 4 P. C. 419.* (*l*) *Wheatcroft v. Hickman, 9 C. B., N. S. 47; 8 H. L. C. 268; 30 L. J., C. Holme v. Hammond, L. R., 7 Ex. 218; P. 125.*
41 L. J., Ex. 157.

ler, 35 Ill. 544; *Smith v. Tarlton, 2 Barb. Ch. 336; Bonnaffle v. Fenner, 6 Smedes & M. 212; Cutler v. Thomas, 25 Vt. 73; Buffum v. Buffum, 49 Me. 108; Villa v. Jonte, 17 La. Ann. 9; Decker v. Howell, 42 Cal. 636; Stapleton v. King, 33 Iowa. 28; Strader v. White, 3 Neb. 348; Lewis v. Greider, 51 N. Y. 231; Smith v. Small, 54 Barb. 223; Dalton City v. Dalton Mfg. Co. 33 Ga. 243; Ryder v. Wilcox, 103 Mass. 24; Tozer v. Hirsbey, 15 Minn. 257; Lord v. Procton, 7 Phil. (Pa.) 630; Tumlin v. Goldsmith, 40 Ga. 221; Southwick v. McGovern, 28 Ill. 533. A mere community of interest, however, will not constitute a partnership (*Gregory v. Brooks, 3 Thomp. & C. (N. Y.) 517; Bockler v. Hardenburgh, 37 N. Y. Superior Ct. (J. & S.) 110*). But as to where one is authorized to hold himself out as a partner, see *Hinman v. Littell, 23 Mich. 484*. The partnership must be voluntary (*Hedges' Appeal, 63 Pa. St. 273*); mere general reputation will not establish the relation.*

the true principle of partnership liability." (*m*) By the 28 & 29 Vict. c. 86, s. 1, the advance of money by way of loan, to a person engaged or about to engage in any trade or undertaking, upon a contract in writing with such person, that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not of itself constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such. By sect. 2, no contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking, by a share of the profits of such trade or undertaking, shall of itself render such servant or agent responsible as a partner therein, or give him the rights of a partner. By sect. 3, no person being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of, or be subject to any liabilities incurred by, such trader. By sect. 4, no person receiving by way of annuity or otherwise, a portion of the profits of any business, in consideration of the sale by him of the good-will of such business, shall, by reason only of such receipt, be deemed to be a partner of, or be subject to the liabilities of, the person carrying on such business. By sect. 5, in the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than 20s. in the

(*m*) *Wheatcroft v. Hickman*, 9 C. B. N. S. 47; 8 H. L. C. 268; L. J. C. P. 125. *Adams v. Frank*, 53 Ill. 219; *Owens v. Mackall*, 33 Md. 382; *Buck v. Dowley*, 82 Mass. (16 Gray) 555; *Manhattan, &c. Mfg. Co. v. Sears*, 1 Sweeney, 426.

pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a good-will as aforesaid, be entitled to recover any such profits as aforesaid, until the claims of the other creditors of the said trader for valuable consideration, in money or money's worth, have been satisfied. By sect. 6, in the construction of the Act, the word "person" is to include a partnership firm, a joint-stock company, and a corporation.

99. *Inchoate and incomplete partnerships.*—If several persons agree to unite together in partnership and to raise a joint-stock, and one borrows money, and another procures goods, to make up his share of the joint contribution, the one is not liable for the debt contracted by the other, as the partnership is not fully formed, and the partner is not acting in discharge of the ordinary functions of the copartnership, but on his own private account. (n) But, as soon as the partnership is in actual operation, and has begun business on the joint account, all those of the intended partners who assent to the commencement of the trading operations for their common benefit, or take an active part in promoting them, become present and complete partners in the undertaking, and impliedly accord to each other all such powers and authorities as are usual and reasonably necessary, to enable them to discharge the functions of the copartnership, and carry the common object into effect.

100. *Restrictions upon the apparent general authority of one partner to bind another,* made by agreement amongst the partners, are operative only as between

(n) *Saville v. Robertson*, 4 T. R. 725. *Smith v. Craven*, 1 Cr. & J. 500. *Greenslade v. Dower*, 7 B. & C. 638. *Heap v. Dobson*, 15 C. B., N. S. 460.

the partners themselves, and do not limit the partnership authority, as to third persons who acquire rights by its exercise, unless the limitation of authority and liability is established and made known to parties dealing with the firm in the mode presently pointed out. The principal in a business who holds out an agent to the world as an ostensible principal, and carries on the business under the management and in the name of such agent, is bound by all such acts and contracts of the agent as are incidental to the ordinary conduct of the business; and such liability as to the rest of the world cannot be restricted by any private arrangement between them. (o)¹ But, if goods are supplied to A and B (who are partners) after notice by A that he will not be answerable for any goods subsequently sent, it is incumbent on the plaintiff, in an action for the amount of such goods, to prove some act of adoption on the part of A, or that he has derived benefit from the goods. (p)

101. *Dealings by one partner in fraud of the copartnership.*—Every one of the partners is responsible for things done within the scope of their implied authority, although they be done in fraud of the partnership, unless the plaintiff who seeks to charge the copartnership upon the fraudulent dealing of the single partner was himself a party, or in any way privy, to the fraud. If a simple contract concerning the partnership affairs and business is entered into by one of several partners in the trading name of the firm

(o) *Edmunds v. Bushell*, 35 L. J., Q. B. 20. (p) *Willis v. Dyson*. 1 Stark. 164.

¹ And, similarly, where one is authorized to hold himself out as the partner of certain persons, and does so represent himself, it is the same as if those persons themselves represented that a partnership existed between them all. *Hinman v. Littell*, 23 Mich. 484; and see *Thomas v. Green*, 30 Md. 1.

or on behalf of the firm, or in his own name without mention of the copartnership, all the partners are individually liable upon the contract, whether their names do or do not appear upon the face of the written instrument. They stand in the same position as an undisclosed principal who has entered into a simple contract in writing in the name of an agent. (*q*) But this liability is confined to contracts made in the execution of the ordinary business of the copartnership, as one partner is not liable upon the private and particular contracts and engagements of another partner made by him for his own individual benefit alone, and known, or which ought to have been known, by the plaintiff at the time not to be a partnership transaction. (*r*) But a bill accepted in the name of a firm in the hands of a bona fide holder is valid against the firm, although the partner who accepted had no authority to do so, and his doing so was fraudulent. (*s*)¹

In an action by an indorsee against members of a firm on a bill accepted in the name of the firm, upon its being proved that the acceptance was by one of the partners in fraud of the partnership, and contrary to the partnership articles, the onus is cast on the holder of the bill, of showing that he gave value for it. (*t*)

102. Transactions out of the ordinary course of business.—If the trading name of the firm, or an

(*q*) Ante, p. 90. *Trueman v. Loder*, 11 Ad. & E. 594; 2 Smith's L. C. 212. *Beckham v. Drake*, 9 M. & W. 97. *Drake v. Beckham*, 11 Id. 315.

(*r*) *Darlington Joint Stock District Banking Co., ex parte*, in *re Riches*,

35 L. J., Bank. 10. *Leverson v. Lane*, 13 C. B., N. S. 278; 32 L. J., C. P. 10. (*s*) *Wiseman v. Easton*, 8 L. T. N. S. 637.

(*t*) *Hogg v. Skeen*, 18 C. B., N. S. 246; L. J., C. P. 135.

¹ See *Hayes v. Baxter*, 65 Barb. 181; *Potter v. Price*, 3 Pitts. (Pa.) 136; *Barrett v. Russell*, 45 Vt. 43; *Smith v. Hill*, Id. 90; *National Bank v. Ingraham*, 58 Barb. 270; *Chemung, &c. Bank v. Bradner*, 44 N. Y. 680.

adopted or an acquired name, is used in dealings and transactions out of the ordinary scope and business of the copartnership, such a user of the name will not bind the other partners, unless they have expressly assented thereto. In the case of professional partnerships, for example, where it is not usual or necessary for the purpose of carrying on the trading business of the firm, that bills or notes should be made, accepted or negotiated, one partner has no implied authority to pledge the name and credit of the copartnership upon bills and notes. (*u*). One joint tenant of a farm "has no power to bind the other by drawing or accepting bills, because it is not necessary or usual for the purpose of carrying on the farming business that bills should be drawn or accepted." (*x*)¹ Nor can one of two partners bind the others by consenting to a reference, or to an order for judgment in an action against himself and his copartner. (*y*) There is no implication of law from the mere existence of a trade partnership that one partner has authority to bind the firm by opening a banking account on its behalf in his own name. (*z*)²

103. *Bills and notes in the name of the firm, given by one of the partners to secure his own private debt, cannot be enforced against the partnership by the party taking the security, (a) unless he can show that*

(*u*) *Hedley v. Bainbridge*, 3 Q. B. 316. L. R., 6 C. P. 433; 40 L. J., C. P.

(*x*) *Littledale J.*, 10 B. & C. 138, 139. 249.

Holroyd, J., 7 B. & C. 639.

(*y*) *Hambridge v. De La Crouce*, 3 C. B. 745.

(*z*) *The Alliance Bank v. Kearsley*,

(*a*) *Shirreff v. Wilks*, 1 East, 51. *Jones v. Yates*, 9 B. & C. 532. *Ridley v. Taylor*, 13 East, 182. *May v. Chapman*, 16 M. & W. 355.

¹ Ordinary partners will not be bound in solido, by an employment by one of them, of an attorney. *Hyams v. Rogers* 24 La. Ann. 230. And see *Sheimure's Appeal*, 70 Pa. St. 285.

² *Ulery v. Ginrich*, 57 Ill. 537; *Hunt v. Chapin*, 6 Lans (N. Y.) 139.

the partner from whom he took it had the authority of his copartners to pay his own private debt with the acceptance of the firm. (*b*) But, if the bill passes into the hands of a bona fide holder, the latter may enforce payment from the firm without giving any such evidence. (*c*)

104. *Representations and acknowledgments by partners* touching the partnership business and dealings, made in the ordinary course of business, will bind all the members of the firm as between themselves and third parties who have acted upon the faith of such representations and statements. (*d*)

105. *Liabilities of dormant and secret partners.*—Every person who secretly connects himself with a firm in partnership, furnishing capital, labor, and skill, and secretly participating in the profits of the business, stands in the position of an undisclosed principal (*ante*, pp. 43, 44) who has contracted in the name of an agent, and is liable in common with the acting and ostensible partners for the performance of the contracts, and the satisfaction of the debts and liabilities of the copartnership, except in the case of bills and notes not drawn or made in the name of the firm. The secret partner may be sued, although the contract is made in the name of one only of the partners, and the firm has not previously recognized any contracts made in his name alone as partnership contracts; (*e*) but the existence of an actual partnership must be proved

(*b*) *Levenson v. Lane*, 13 C. B., N. S. 287; 32 L. J., C. P. 10. As to whether a reasonable belief by the creditor that the partner had such authority is sufficient, see *Kendal v. Wood*, L. R., 6 Ex. 243, 248; 39 L. J., Ex. 167. It would seem on principle that such belief is not sufficient unless it has been in-

duced by the acts of the other partners.

(*c*) *Wiseman v. Easton*, 8 L. T. R. N. S. 637.

(*d*) *Rapp v. Latham*, 2 B. & Ald. 801.

(*e*) *Beckham v. Drake*, 9 M. & W. 97. *Drake v. Beckham*, 11 Id. 315.

so as to confer on the one an authority to bind the other. (*f*)¹ The mere concurrence of creditors in an arrangement, under which trustees carry on the business of their debtor for their benefit, and for the purpose of dividing the profits of the trade amongst them, does not make them partners. (*g*) When one of two partners allows the other bona fide to carry on the business ostensibly as his own, on the bankruptcy

(*f*) *Kilshaw v. Jukes*, 3 B. & S. 847; S. 47; 30 L. J., C. P. 125; 8 H. 32 L. J., Q. B. 220. L. C. 268. *Re Stanton Iron Co.*, 21

(*g*) *Cox v. Hickman*, 9 C. B., N. Beav. 172; 25 L. J., Ch. 142.

¹ A secret partner is one who keeps himself concealed from the public, and from all the customers of the partnership. Partners whose names are not expressed in the firm, but simply indicated by the word "Co." are not secret or dormant, but "ostensible" partners (*Goddard v. Pratt*, 16 Pick. 428, and see *United States Bank v. Binney*, 5 Mason, 185; *Winship v. Bank of the United States*, 5 Pet. 561); in *Etheridge v. Binney* when the partnership consisted of three persons, but the partnership name was simply the name of an individual, the court instructed the jury, that, "the name of the firm being only the name of an individual, a note offered in that name would, of course, import only a promise of John Winship alone, and the creditor could not recover against the firm without proving that the money actually went into the funds of the firm," but see generally, as to dormant partners, *Phillips v. Nash*, 47 Ga. 218; *Sheeby v. Mandeville*, 6 Cranch, 253; *Van Ness v. Forrest*, 8 Id. 30; *Watson v. Owens*, 1 Rich. 111; *Brozel v. Poyntz*, 3 B. Mon. 178; *Scott v. Colmesuil*, 1 J. J. Marsh. 416; *Dennett v. Chick*, 2 Greenl. 191; *Nichols v. Meares*, 4 Sneed, 229; *Richardson v. Farmer*, 36 Mo. 35; *Groeff v. Hitchman*, 5 Watts, 454; *Bisel v. Hobbs*, 6 Blackf. 479; *Broches v. Anderson*, 14 Mass. 44; *Church v. Sparrow*, 5 Wend. 223; *Baxter v. Clark*, 4 Ired. 127; *Everett v. Chapman*, 6 Conn. 347; *Reynolds v. Cleaveland*, 4 Cow. 282; *Kelly v. Hurlbert*, 5 Id. 534; *Hadfield v. Jameson*, 2 Munf. 66; *Grosvenor v. Lloyd*, 1 Met. 19; *McDonald v. Milandon*, 5 Ga. 406 408; *Smith v. Smith*, 7 Fost. 244; *Brooke v. Washington*, 8 Gratt. 248; *Hill v. Voorhies*, 22 Penn. 680; *Griffin v. Buffum*, 22 Vt. 181; *Pratt v. Langdon*, 5 Allen, 548; *Oakley v. Aspinwall*, 2 Sandf. 7; *Etheridge v. Benney*, 9 Pick. 272.

the latter, the share of the dormant partner in the partnership stock-in-trade does not pass to the trustee, as in the possession, order, or disposition of the bankrupt as reputed owner with the consent of the true owner. (*h*)

106. *Private agreements between parties exempting dormant partners from liability.*—The liability of persons who have participated as principals in the joint speculations and contingent profits of a partnership or joint adventure, cannot, as we have seen (*ante*, p. 74), in any way be controlled or affected by the secret contracts of the joint adventurers *inter se*. If, therefore, the joint adventurers expressly agree not to be partners *inter se*, such an agreement cannot in any way affect their position as regards the public. If several partners or joint adventurers in a particular trade or business agree that the trade shall be carried on by one or more of them in their own names as the ostensible and acting partners, and that certain secret partners who contribute capital, skill, or labor to the joint stock of the partnership, shall not be liable for losses beyond a certain amount, the operation of the agreement is confined to those who are parties to it, and cannot affect the liability of such secret partners as regards the public and third persons, unless the limitation of liability is established and made notorious, in the mode presently pointed out (*post*, p. 98). And it matters not whether the party participates in and receives, or bargains for, a share in the accruing profits for his own benefit, or as a trustee or executor for others. Equally indifferent is it whether his share be large or small. (*i*)¹

(*h*) *Reynolds v. Bowley*, L. R., 2 Q. B. 474; 36 L. J., Q. B. 247.

(*i*) *Wightman v. Townroe*, 1 M. & S. 412.

¹ *Lomme v. Kintzing*, 1 Mon. T., 290; *Parmeter v. Kingsley* 45 Vt. 362.

107. *Liabilities of nominal partners.*—Persons may become clothed with the legal liabilities and responsibilities of partners, as regards the public and third parties, by holding themselves out to the world as partners as well as by contracting the legal relationship of partners inter se. When the question is not between the parties themselves as to what shares they shall divide, but respecting creditors claiming a satisfaction out of the funds of a particular house, as to who shall be deemed liable in regard to those funds, the sense or understanding of the parties themselves inter se that they shall not be partners will be of no avail, and will not affect the existence of the partnership so far as regards the public at large.¹ “If a man will lend his name as a partner, he becomes as against all the rest of the world a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them.” (k)²

(k) Eyre, C. J., *Waugh v. Carver*, 2 H. Bl. 246; 1 Smith, 502, 503.

¹ See cases cited in note, 1 p. 169. *Parsons on Partnership* p. 416; *Edwards v. McFall*, 5 La Ann. 167; *Goddard v. Pratt* 16 Pick. 428; and see *Grosvenor v. Lloyd*, 1 Met. 19; *Benton v. Chamberlin*, 23 Vt. 711; *Bernard v. Torrance*, 5 Gill & J. 583. On the discovery of a dormant partner, the creditors may elect either to proceed against the ostensible partners or against the actual firm property. *Parsons on Partnership*, p. 500. But see *French v. Chase*, 6 Greenl. 166; *Lord v. Baldwin*, 6 Pick. 348; *Cammack v. Johnson*, 1 Green Ch. 164; *Witter v. Richard*, 1 Cons. 37; *Clarkson v. Carter*, 3 Cow. 85; *Boardman v. Keeler*, 2 Vt. 65.

² And so one who has been engaged in carrying on business in the name, and ostensibly as a member of a firm, cannot set up

108. *Persons suffering themselves to be held out to the world as partners* or members of a particular firm, by permitting their names to be used in the business, or exhibited over a shop window,¹ or to be written in invoices or prospectuses,² or to be published in advertisements³ as the names of members of the firm, are chargeable as partners, although they are not in point of fact partners, and have no share or interest in the business. (*l*)⁴ But it must appear that the partnership was actually formed and in operation, and was not merely a projected joint adventure. (*m*) If a person holds himself out to the world as a partner with another in a particular line of business only, he does not thereby render himself liable as a partner in other transactions not within the course of that business. (*n*) And, if a plaintiff has contracted with a firm in partnership, knowing at the time that the defendant, whose name appeared in the name of the firm as an ostensible partner, was not in fact a partner, and had no share or interest in the partnership, he cannot afterwards make the defendant responsible upon the contract which he entered into with notice of that

(*l*) *Guidon v. Robson*, 2 Campb. 304.

(*n*) *De Berkon v. Smith*, 1 Esp

(*m*) *Bourne v. Freeth*, 9 B. & C. 640, 29.

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as against his own acts the non-existence of the firm by reason of a want of consent in one of its members (*McGlea v. Matthews*, 50 N. Y. 167).

¹ *Parsons on Partnership*, p. 132.

² *Id.*; *Stearns v. Haven*, 14 Vt. 540; *Hicks v. Cram*, 17 Vt. 540; *Tottrill v. Van Dusen*, 22 Id. 511; *Matthews v. Felat*, 25 Id. 536; *Perry v. Randolph*, 6 Smedes & M. 335; *Chapman v. Wilson*, 1 Rob. (Va.) 267; *Chidney v. Porter*, 21 Pa. St. 390; *Mershon v. Hobensack*, 2 N. J. 372; *Smith v. Smith*, 7 Foster, 244; *Holmes v. Porter*, 39 Me. 157; *Barnett v. Smith*, 17 Ill. 565; *McMullan v. Mackenzie*, 2 Green (Iowa). 363.

³ *Id.*

⁴ *Id.*

fact. (o) If a man's name is used without his knowledge and consent, he cannot be made responsible as a partner, upon the strength of such false representation. (p) A man may, however, be fixed with the liabilities and responsibilities of a partner through the medium of his own express admissions or representations; (q) but a plaintiff seeking to found an action upon them must prove that he knew of, and acted upon, such statements and representations, and dealt with, and credited, the firm, under the belief that they were true. (r) No mistaken supposition of a party as to his being a partner will make him liable as such, unless it were communicated to the plaintiff so as to mislead him. (s)¹

(o) *Alderson v. Pope*, 1 Camp. 403, n.

(r) *Carter v. Whalley*, 1 B. & Ad.

(p) *Fox v. Clifton*, 4 M. & P. 713.

14.

(q) *Parke, J., Dickinson v. Valpy*, 10 B. & C. 140. *Ld. Kenyon*, 1 Esp. 30.

(s) *Vice v. Lady Anson*, 7 B. & C.

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¹ In general conversations, assertions, or admissions, and acts tending to show that parties are partners, will go to prove the existence of a partnership as to third persons (*Parsons on Partnership*, p. 122). The rule is thus stated by *Parsons (Id.)*: "Every one who authorizes another to believe him a partner, is, as to the person so authorized, a partner, but it must also be true, that this authorization must be such as would be so regarded by a reasonable and fair man; and a mere conjecture that a man is a partner, even from circumstances tending that way, is not sufficient to hold him as such." And see *Baker v. Nappier*, 19 Ga. 520; *Wood v. Pennell*, 51 Me. 52; *Fitch v. Harrington*, 13 Gray, 468; *Benedict v. Davis*, 2 McLean, 347; *Markham v. Jones*, 7 B. Mon 456; *Buckingham v. Burgess*, 3 McLean, 364, 549; *Hicks v. Cram*, 17 Vt. 449.

The use of a firm name generally indicates a partnership (*Charman v. Henshaw*, 15 Gray, 293). See the question as to whether, if a person who is not generally or publicly declared to be a partner, is declared, with his consent, to be a partner to one customer, and that customer communicates the fact to another customer, the person thus disclosed is to be held as a partner by the second customer, if he be not a partner in fact; treated by *Parsons*, on *Partnership*, p. 130.

109. *Liabilities of incoming and retiring partners.*—An incoming partner cannot be made responsible for the non-performance of contracts entered into by the firm before he became an actual or reputed member of it. He cannot, for instance, be made responsible upon bills or notes accepted or made by his copartners before he became a member of the firm ; but, if a bill be accepted on account of a debt which was incurred partly before, and partly after, such partner joined the firm, he is liable for so much of the debt for which the bill was accepted as accrued subsequently to his accession to the partnership. (1) An incoming partner cannot be charged with the payment of the price of goods sold to the copartnership before he became a member of it, although they may have been delivered subsequently thereto. (2) "When a banking firm," observes Parke, B., "makes payments professedly on account of a customer without his authority, and those payments are entered to the debit of the customer in the books of the firm, parties who afterwards become partners in that firm are not to be considered as agreeing to impose upon themselves a liability for anything more than that which by the books themselves, which are handed over to the new firm, appears to be due to the customer. In order to render the new firm liable for the amounts which do not so appear upon the books, it is necessary to show that the old firm have ceased to be liable and are discharged ; and in order to do so you must show an agreement between the old and the new firm and the customer, that the new firm is to be considered as substituted as the debtor in lieu of the old, for the amount sought to be recovered. There may be cases in which

(1) *Wilson v. Lewis*, 2 Sc. N. R. 118. *Whitehead v. Barron*, 2 M. & Rob.

(2) *Wilson v. Bailey*, 9 Dowl. 20. 248.

the new firm agrees to become liable for the actual, not the apparent, balance." (x) The transfer of the accounts from the old to the new firm, and the acceptance by the creditor of a new simple contract security from the new firm for the debt due to him, is not of itself sufficient to discharge a retiring partner. There must be an agreement, either express or fairly to be inferred, to discharge the old firm. (y) Where a firm was newly constituted, but no alteration was made in the mode of carrying on the business, and the accounts were continued in the old books as if no change had taken place, and the existing liabilities were discharged or diminished either from the assets of the old firm or from the funds of the new firm indiscriminately, it was held that this was cogent evidence that the new firm had assumed the liability to pay the debts of the old firm. (z)¹ Where creditors of the old firm know that the new firm has arranged to assume the debts of the old firm, and go on dealing and receive payment of part of the debt out of the blended assets of the old and new firms, such creditors thereby discharge the old firm, and accept the new firm as their debtor. (a)²

(x) *Craufurd v. Cocks*, 8 Exch. 291.

(y) *Harris v. Farwell*, 15 Beav. 31.

Brown v. Gordon, 22 Id. 68. *Kirwan v. Kirwan*, 2 Cr. & M. 617.

(z) *Bank of Australasia v. Flower*, L. R., 1 P. C. 27; 35 L. J., P. C. 13.

(a) *Bank of Australasia v. Flower*, L. R. 1 P. C. 27; 35 L. J., P. C. 13.

¹ But see, in this country, *Hart v. Tomlinson*, 2 Vt. 101, which held that the new partner was not liable, even when there was no change in the firm name, or notice of the new partnership.

² An incoming partner is not liable for any debts or obligations of the old firm, unless he assumes them for a consideration (*Pandexter v. Waddy*, 6 Mumf. 113; *Hart v. Tomlinson*, 2 Vt. 101; *Sternburg v. Callanan*, 14 Iowa, 251; *Cadwallader v. Blair*, 18 Id. 420; *Hartley v. Kirlin*, 45 Pa. 49; *Thrall v. Seward*, 37 Vt. 573; *Updyke v. Doyle*, 7 R. I. 446; *Francis v. Smith*, 1 Duvall, 121). But if the new partner assumes them

110. Notice of retirement of partners, and of the dissolution of the copartnership.—If once a person holds himself out as being a partner, till he gives notice that he has ceased to be so, those who deal with the firm upon the faith of the supposed partnership may consider him as a partner, and he is bound by that representation. (*b*) The retirement of an ostensible partner ought to be made as notorious as the fact of his connection with the firm. A notice in the "London Gazette" is insufficient, unless there is a reasonable presumption that the paper has been seen and read by the parties dealing with the firm. "Many people there are who never see a 'Gazette' to the day of their deaths; and very mischievous would be the consequences if they were bound by a notice inserted in it." (*c*) And, even if the advertisement is inserted in a paper which a plaintiff, who is suing a retired partner, is in the habit of reading, the insertion, unless it has been frequently repeated, is of itself very meager evidence of the plaintiff's knowledge of the fact. (*d*) The only certain and secure way of putting an end to the continuing liability, is to insert frequent advertisements of the retirement of the partner in all papers having the greatest circulation in the immediate neighborhood of the place where the business of the copartnership is carried on, and to send express notice to every person residing at a distance who has been in the habit of dealing with the partnership

(*b*) *Goode v. Harrison*, 5 B. & Ald. 157.

(*c*) *Ld. Kenyon, Graham v. Hope*, Peake, 208.

(*d*) *Jenkins v. Blizard*, 1 Stark. 420

at all, the consideration might be his admission into the firm (*Parsons on Partnership*, 450). And if the firm went on paying interest on old debts, he might become presumptively liable. See *Parsons on Partnership*, 435.

during the time that the retiring partner was a member of the firm. (e)¹

III. Retirement of dormant partners.—Dormant

(e) *M'Iver v. Humble*, 16 East, 169. *Barfoot v. Goodall*, 3 Campb. 148. *Newsome v. Coles*, 2 Campb. 617. *Lacy v. Woolcott*, 2 D. & R. *Hart v. Alexander*, 2 M. & W. 490. 460.

¹ There is no usage here corresponding to the custom of "finding one's self in the Gazette," which is alluded to in the text. Persons advertising dissolutions of firms may take their choice of newspapers (*Parsons on Partnership*, 417). The retirement of a partner, in law works a dissolution of the firm of which he was a member (*Id.* 34). And see *Howe v. Thayer*, 17 Pick. 95; *Scholefield v. Erchelberger*, 7 Pet. 586; *Dyer v. Clark*, 5 Met. 575; *Washburn v. Goodman*, 17 Pick. 519; *White v. Union Ins. Co.* 1 Mott. & McC. 559. The retiring partner, however, loses no property, nor relieves himself from any liability. *Parsons on Partnership*, 409; but see *Savage v. Rockwell*, 32 N. Y. 501. As a general rule, he cannot be held for a new obligation of the firm, by those having notice of his retirement, or of the dissolution of the firm, however communicated. But circumstances may vary the application. See *Dynlop v. Gregory*, 6 Seld. 241; *Matthews v. Dare*, 20 Md. 273; *American, &c. Thread Co. v. Wortendyke*, 24 N. Y. 550; *Spaulding v. Ludlow, &c. Woollen Mill*, 36 Vt. 150; *Robb v. Mudge*, 14 Gray, 534; *Lange v. Kennedy*, 20 Wis. 279; *Davis v. Keyes*, 38 N. Y. 94; *Bernard v. Torrence*, 5 Gill. & J. 383; *Tombeckbee Bank v. Dumell*, 5 Mason, 56; *Lansing v. Gaine*, 2 Johns, 300; *Ketcham v. Clark*, 6 Johns 144, 148; *Le Roy v. Johnson*, 2 Pet. 198, 200; *Princeton, &c. Turnpike Co. v. Gulick*, 1 Har. 161; *Buffalo, &c. Bank v. Howard*, 35 N. Y. 500; *Ennis v. Williams*, 30 Geo. 691; *Pursley v. Ramsey*, 31 Geo. 619; *Ellis v. Bronson*, 40 Ill. 455; *Denman v. Dosson*, 28 La. Ann. 9; *Zollar v. Janvrin*, 47 N. H. 324; *Prentiss v. Sinclair*, 5 Vt. 149; *Graves v. Merry*, 6 Cow. 701; *Ketcham v. Clark*, 6 Johns. 144, 147; *Newcomet v. Bretzman*, 69 Pa. St. 185. And see generally as to dissolution and liabilities thereafter (*Johnson v. Hartshorn*, 52 N. Y. 173; *Parker v. Parker*, 65 Barb. 205; *White v. Colfax*, 33 N. Y. Superior Ct. 217; *Tugley v. Whitaker*, 22 Ohio St. 606; *Herty v. Clark*, 46 Ga. 649; *Wells v. Erstein*, 24 La. Ann. 317; *Giddings v. Palmer*, 107 Mass. 269; *Schandler v. Enell*, 45 How. Pr. 33; *Dounce v. Parsons*, 45 N. Y. 180; *Hill v. Marcy*, 49 N. H. 265; *Parker v. Canfield*, 37 Conn. 250; *Guard v. Clark*, 29 Iowa, 189; *Haddock v.*

and secret partners may release themselves from all further liability by a simple relinquishment of their share in the profit and loss of the business. They continue responsible upon all executory contracts and transactions in actual operation at the time of their withdrawal; but they are not liable upon the subsequent contracts of the firm, and the debts and liabilities incurred after their retirement. (*f*) But, if they are not strictly secret, as well as dormant partners, notice of the termination of their connection with the copartnership must be given. (*g*)¹

112. When a partnership or trading association is under the management of trustees or directors, the common-law power of one partner to bind another existing in ordinary trading partnerships, ceases; and notice to a party that there are trustees or directors, is notice to him that he is not dealing with an ordinary partnership. (*h*) The shareholders or partners are liable only upon contracts made by the trustees or directors in the ordinary course of business, in the same manner as dormant partners in any ordinary partnership. But no private agreement between the

(*f*) *Carter v. Whalley*, 1 B. & Ad. 11. (*h*) *Parke, B., Hallett v. Dowdall*, 21
(*g*) *Farrer v. Definne*, 1 C. & K. 580. L. J. Q. B. 105.

Crocheron, 32 Tex. 276; *Springer v. Dwyer*, 58 Barb. 189; *Carrol v. Alston*, 1 S. C. 7; *Cory v. Long*, 2 Sweeney, 491; *Emerson v. Parsons*, Id. 447; *Parks v. Comstock*, 59 Barb. 16; *Gibbs v. Bales*, 43 N. Y. 192; *Bartley v. Williams*, 66 Pa. St. 329; *Kistner v. Sendlinger*, 33 Ind. 114; *Garnier v. Gebhard*, 1u. 225, *Colgrove v. Tallman*, 2 Lans. 97; *Schorten v. Davis*, 21 La. Ann. 173; *American Bank Note Co. v. Edson*, 56 Barb. 84, 1 Lans. 388; *Bacon v. Hutchings*, 5 Bush. (Ky.) 593; *Montague v. Reakert*, Id. 393. And whether a person has actual notice of the dissolution of a firm, is a question of fact for the jury. *Parsons on Partnership*. 413; *Dedford v. Reynolds*, 36 Pa. St.; *Merrit v. Pollys*, 16 B. Mon. 355.

¹ But see *Parsons on Partnership*, 415, 416.

shareholders and directors, restricting the apparent general authority of the latter to bind the former by their contracts, or qualifying and limiting the liability of the shareholders upon such contracts, will be of any avail as against the claims of creditors of the partnership who have dealt with the directors in ignorance of the particular limitations and restrictions placed upon their apparent general authority. (*i*)

113. *Authority of committeemen.*—Where a review was established by an association of shareholders, who passed certain written resolutions for its regulation and management, and appointed a committee of shareholders “to assist the editor in promoting the prosperity and circulation of the review, and to obtain literary contributions,” it was held that this resolution did not empower one of the committee to contract with any person for the supply of literary articles, or to bind the shareholders to pay for them when supplied and inserted in the review. (*k*)

114. *Liabilities of partners upon deeds.*—In order to make a partner liable upon a deed, it must be shown that he actually sealed and delivered the deed in person, or that it was done by another for him, in his presence, and by his commandment; (*l*) or, if executed by one partner on behalf of the firm generally, as the deed of the partnership, it must be shown that the partners sued upon it authorized their copartner to execute the deed by a power of attorney under seal, and the authority under seal, when it exists, must be produced and proved. (*m*)¹ Where one of two

(*i*) *Hawken v. Bourne*, 8 M. & W. 709. (*l*) *Ball v. Dunsterville*, *ante* p. 709. *Rex v. Dodd*, 9 East, 527. 45
Walbourne v. Ingilby, 1 M. & K. 76. (*n*) *Steiglitz v. Egginton*, Holt, N
 (*k*) *Heraud v. Leaf*, 17 L. J., C. P. 57. P. C. 141.

¹ See cases cited, *ante*, note 1, page 157.

partners caused a bond to be made out in the name of the firm, "Davis and Marsh," and sealed and delivered it as the deed of the partnership, it was held that it could not bind the other partners, as they had given their copartner no authority under seal to enter into and execute deeds in their behalf, or on behalf of the firm. (n)

115. *Of corporations aggregate.*—The effect of a general and unqualified incorporation of two or more persons, at common law, is to create an aggregate body politic, or legal entity, with rights and liabilities completely separate and distinct from the individual existence, rights, and liabilities of its members. This legal entity is, as it has been sagely remarked, without soul or conscience, and without any visible or outward form, and can not, therefore, be either excommunicated, or outlawed, or arrested. It could only in former times be compelled to answer, in an action at law, by a distringas against its goods and chattels, and could only appear by attorney appointed under its common seal; and, if it had neither lands nor goods, there was no way of bringing the corporate body either into a court of law or a court of equity. Its debts are, at common law, its own debts, and not the debts of the individual members thereof; and the latter, consequently, are not answerable, either in their persons or property, for the corporate debts; and, if there are no corporate effects whereon to levy judgments and executions obtained against the body corporate, the creditors must go unpaid. (o) Amongst the powers and privileges possessed by the body corporate from the mere act of incorporation, and without any

(n) *Elliott v. Davis*, 2 B. & P. 339. *Harrison v. Jackson*, 7 L. R. 210.

(o) Bro. Abr. fol. 183—186; fol. 265 pl. 82. *Edmunds v. Brown*, 1 Lev 237.

special provision or stipulation in the charter, is the power of making by-laws for the government of the body politic, subject to the laws of the realm and subordinate thereto, (*p*) and the power (in the case of ancient corporations) of electing its own members at corporate meetings, and appointing its own officers; of suing and being sued in the corporate name; of holding and enjoying property in such name; of purchasing and parting with its possessions; and of acting and speaking through a common seal, which is said to be "its hand and mouth-piece." Corporations can not lawfully purchase or hold lands without the license of the crown, or the authority of parliament; (*q*) and they can not, consequently, lawfully enter into or enforce real contracts, concerning lands, without a license or authority to hold lands.¹

116. *Contracts with corporations.*—All contracts of importance entered into by corporations must, with some exceptions presently noticed, be made under the common seal of the body corporate, and in the corporate name. If the contract is made in the name of the head of the corporation, or in the names of the individual members thereof, the corporate body cannot in general sue or be sued upon the contract, although the common seal has been affixed to it. (*r*) If a covenant is made with a corporation by name, it is sufficient if the name and description inserted in the deed are "the same in substance with the true name; it need not be the same in words or syllables;" (*s*) for,

(*p*) *Reg. v. Wood*, 5 Ell. & Bl. 49.

(*q*) *Co. Litt.* 92 a, 2 b.

(*r*) *Bro. Abr. CORPORATIONS*, pl. 31.

15 E. 4, 1. *Com. Dig. Franchises*, F. 19.

(*s*) *Rex v. Haughley*, 4 B. & Ad. 655.

Sidney Sussex College v. Davenport, 1

Wils. 184. *Croydon Hosp. v. Farley*

6 Taunt, 467.

¹ Corporations likewise in the United States are creatures of the statutes (either organized under the general or individual acts) of the several states.

whenever there is in truth but one and the same corporation, contracts made with them ought not to be avoided by nice and verbal variances, when it plainly appears what was the true name of the corporation. And there is a difference between ancient corporations and corporations made of late times; for ancient corporations may by usage have divers and several names, and leases, grants, &c., by any of them will be good enough. (t) If, moreover, a corporation adopts any particular name or seal different from its true name or seal, and uses it in making contracts, it may be estopped from showing that the name and seal so adopted and used are not its true name and seal. (u)¹

(t) *Mayor, &c. of Lyne*, 10 Co. 123 a.

(u) *Elliott v. Davis*, 2 B. & P. 338.

¹ See *Conine v. Junction, &c. R. R. Co.* 3 *Houst. (Del.)* 288; *Leggitt v. New Jersey Mfg., &c. Co.* 1 *Saxt.* 541; *Lovett v. Steam Saw Mill Association*, 6 *Paige*, 54; *Reed v. Bradley*, 17 *Ill.* 321; *Susquehanna, &c. Co. v. General Ins. Co.* 3 *Med.* 305; *Levering v. Mayor, &c. of Memphis*, 7 *Humph.* 553; *St. Louis, &c. Schools v. Risley*, 28 *Mo.* 415; *Burrill v. Nahant Bank*, 2 *Metc.* 163; *Flint v. Clinton Co.* 12 *N. H.* 434; *Benedict v. Denton*, 1 *Walk. Ch.* 336; *Baptist Church v. Mulford*, 3 *Halst.* 183; *President, &c. v. Myers*, 6 *Serg. & R.* 12; *Adams v. Creditor*, 14 *La.* 455; *St. Mary's Church Case*, 7 *Serg. & R.* 530; *St. John's Church v. Steinmetz*, 18 *Pa. St.* 273; *Johnson v. Bush*, 3 *Barb. Ch.* 207; *Tenney v. East Warren Lumber Co.* 43 *N. H.* 343; *Case of Sutton's Hospital*, 10 *Co.* 30; *Goddard's Case*, 2 *Id.* 5; *Ranson v. Stonington Savings Bank*, 2 *Beasl.* 215; *Stebbins v. Merritt*, 10 *Cush.* 27; *Mill Dam Foundry v. Hovey*, 21 *Pick.* 417; *Ernst v. Bartle*, 1 *Johns. Cas.* 319; *Woodham v. York & Cumberland R. R. Co.* 50 *Me.* 549; *Stebbins v. Merritt*, 10 *Cush.* 27; *City Council v. Moorhead*, 2 *Rich.* 430; *Bates v. Boston, &c. R. R. Co.* 10 *Allen*, 251; *Corrigan v. Trenton, &c. Co.* 1 *Halst. Ch.* 52; *Johnston v. Crawley*, 28 *Ga.* 316. The effect of affixing a seal by a corporation is the same as when an individual affixes his seal. It makes the instrument a specialty (*Clark v. Woolen Mfg. Co.* 15 *Wend.* 256; *Benoist v. Inhabitants &c.*, 8 *Mo.* 250; *Porter v. Androscoggin, &c. R. R.*

117. Want of mutuality of obligation.—If an executory simple contract, founded upon mutual promises and a mutuality of obligation and liability is not binding upon a corporation by reason of its not being under the seal of the body corporate, it can not be enforced by the corporation by reason of the absence of reciprocity or mutuality of obligation and liability. (*x*)

Infancy in the mayor, bailiff, or other head of a corporation, or any incapacity to contract on the part of individual members thereof, do not in any way affect the rights and liabilities of the corporation in respect of corporate acts. (*y*)

An act done by the members of a municipal corporation in the absence of the head is not the act of the corporation. Thus, if a bond be given by the commonalty in the absence of the mayor, the body corporate is not bound. But, if a mayor *de facto*, together with such other members of the corporation as are empowered to bind the whole by their act, put the common seal to an obligation, this shall bind the corporation, though he be not *de jure* mayor: for, being in fact appointed to the office, and permitted to act in it by the corporation who might have removed him, all judicial and ministerial acts done by him are valid. Generally speaking, all corporations are bound by a covenant under their corporate seal, properly affixed, as much as an individual is by his own deed. But, where corporations are created by act of parliament

(*x*) *Copper Miners, Gov. & Co. of v. Fox*, 20 L. J., Q. B. 176; 16 Q. B. 829. (*y*) 1 Kyd. 312. *Rex v. Carter*, Cowp. 225. Bro. Abr. CORPORATIONS 63.

Co. 37 Me. 349) The rule that an instrument under seal imports a consideration, applies as strongly to one made by a corporation acting within its powers, as to natural persons. *Sturtevant v. Alton*, 3 McLean, 393.

for particular purposes, with special powers, then their deed, though under their corporate seal, regularly affixed, will not bind them, if it plainly appears that the deed is ultra vires. (2) If the common seal has not been affixed to the contract, the general rule is, that the contract is not the contract of the corporation, but of the individual members concerned in the making of it, who can alone sue and be sued thereon. (a)¹ But this rule has been subjected to numerous exceptions, and has been almost superseded in practice in the case of trading corporations, the end and object of whose existence could never be accomplished if every corporate act was required to be authenticated under the common seal.

118. Implied contracts with corporations.—If a person has had the benefit of the fulfillment of a contract which could not have been enforced against a corporation whilst it remained executory, the law will raise an implied promise in its favor, upon which it may sue in its corporate character. (b) Where, for example, a party has enjoyed all the benefit and advantage of a parol contract entered into with a corporation, he will not be permitted to discharge himself from the ordinary liability on the ground that the contract was not entered into under the common seal of the corporate body. A municipal corporation, therefore, may sue upon the ordinary implied promise in respect of money received under a contract with the corporation, void by reason of its not being under the common seal; also

(2) *Payne v. Mayor of Brecon*, 3 H. & N. 576.

(a) *Bro. Abr. CORPORATIONS*, pl. 47, 49, 50, 56, 63. 1 *Roll. Abr.* 514.

(b) *East Lond. Water Co. v. Failey*, 4 Bing. 287. *Beverley v. Linc. Gas Co.*, 6 Ad. & E. 539; 2 N. & P. 233. *Aust. R. M. St. N. Co. v. Maizetti*, 24 L. J. Ex. 273.

¹ See note 1, p. 184.

for the use and occupation of tolls not granted to the occupier under the common seal; (c) and for the use and occupation of houses and lands, the property of the corporation, where the tenant has actually occupied and taken and enjoyed the profits of the land. (d) The corporation is in like manner responsible upon the ordinary implied promise in respect of the use and occupation of houses and lands, during the period it actually occupied, but no longer, as it can not be bound by an executory contract for an interest in land not made under its common seal. (e) So, if there has been part performance of a contract for a lease by a corporation, specific performance will be decreed, though the contract was not under the corporate seal. (f)¹

A corporation with a head, such as a municipal corporation, may also transact trifling matters of business, and enter into such ordinary contracts as are of constant recurrence, and the making of which forms part of its customary and usual functions, without the employment of its common seal. It may hire the ordinary servants of the corporation, such as a butler, cook, bailiff, &c., and may contract for the purchase of trifling articles without deed.² "If the head of a corporation, by the intervention of a servant, buys certain

(c) *Mayor, &c., of Carmarthen v. Lewis*, 6 C. & P. 608. *ral, L. R.*, 4 Ex. 162; 38 L. J., Ex. 93.

(d) *Dean, &c. of Rochester v. Pierce*, 1 Campb. 466. *Mayor of Stafford v. Till*, 12 Moore, 260; 4 Bing. 77. *Finlay v. Brist. & Ex. Rail. Co.*, 7 Exch. 416; 21 L. J. Ex., 117.

(f) *Steeven's Hospital v. Dyas*, 15 Ir. Ch. R. 405. *Crook v. Corporation of Seaford, L. R.*, 10 Eq. 680; *Id.* 6 Ch. 551.

¹ *Bissell v. Southern, &c. R. R. Co.* 22 N. Y. 258; *De Graff v. American, &c. Thread Co.* 24 Barb. 375.

² A corporation may appoint an agent without seal. *Lathrop v. Commercial Bank*, 8 Dana, 114; *Board of Education v. Greenebaum*, 39 Ill. 612.

things for the use of a corporation, which are actually applied to their use, they are bound by this contract and an action may be maintained against them after the change of the head in whose time the purchase was made. So, if the regular servant of the corporation make a purchase, and apply it to the use of the corporation, it would seem that the corporation is bound." (*g*) Where the head of a municipal corporation gave an oral order for weights and measures which were sent to him, and were afterwards examined at the town hall, at a full meeting of the corporation and approved, accepted, and used by the corporate body, it was held that the corporation was responsible for the price of the goods so ordered. (*h*) If a municipal corporation has wrongfully got possession of the money of a stranger, or the money of one of its own members, the law raises an implied promise from the corporate body to refund the amount, just the same as in the ordinary case of the receipt of money by a private individual which the latter has no right in conscience or equity to retain. (*i*) But in all matters of consequence and importance, and in respect of acts and contracts not coming within the scope of its ordinary, every-day functions, the corporation is not bound by the act done, unless it is a corporate act authenticated by writing under the common seal. (*k*)¹

(*g*) 1 Kyd. 313, 314, citing Longo Quinto (Ed. 4), 70-74.

of Swansea, 5 Q. B. 547; 13 L. J., Q. B. 112.

(*h*) *De Grave v. Mayor, &c. of Monmouth*, C. & P. 111.

(*k*) *Mayor, &c. of Ludlow v. Charlton*, 6 M. & W. 815.

(*i*) *Ld. Denman, Hall v. Mayor, &c.*,

¹ The presumption is in favor of the validity of the act of a corporation (*Kilgore v. Buckley*, 14 Conn. 362; *Akin v. Blanchard*, 32 Barb. 527; and see *Nelson v. Eaton*, 26 N. Y. 410; *Regents v. Detroit, &c. Society*, 12 Mich. 138; *Brown v. Winnisimmet Co.* 11 Allen, 326). And a debt due to a corpora-

At a meeting of the town council of a municipal corporation, a resolution was entered in the corporation books, to the effect that the salary of the town clerk should be increased; but it was held that the corporate body was not bound by this resolution, as it had not been made under the common seal. (1)¹ So, where the London Dock Company accepted by parol, through their clerk, a tender by a contractor to cleanse the docks for a year for a certain sum, and the contractor refused to fulfill his engagement, it was held that the company could not enforce the contract, as the offer had not been accepted under their common seal. (m) And, where the guardians of a union, a corporate body by statute, entered into a contract under their common seal with the plaintiff for the making of a survey and map of one of the parishes in the union, which contract was duly fulfilled, and, subsequently, in consequence of a reduced plan being directed to be made, the plaintiff prepared an outline map on a reduced scale, which was received and used

(1) *Reg. v. Mayor, &c. of Stamford*, *Mayor, &c. of Warwick*, 15 L. J., Q. 6 Q. B. 433. As to orders for B. 306.
the payment of money out of the (m) *Lond. Dock Co. v. Sinnot*, 8 Ell. borough fund, see *The Queen v. & Bl.* 347.

tion will be presumed to have been contracted in the ordinary course of legislation (*Fireman's Ins. Co. v. Sturges*, 2 Cow. 664; *Lafford v. Wyckoff*, 4 Hill, 444; *Dockery v. Miller*, 9 Humph. 731; *Howard v. Boorman*, 17 Wis. 459; *Barker v. Mechanic Fire Ins. Co.* 3 Wend. 94, *Wilmart v. Crawford*, 10 Id. 341) A valid contract can not be impaired by legislation (*Gelpecke v. Dubuque*, 1 Wall. 175; *Havemeyer v. Iowa County*, 3 Id. 294; *Thompson v. Lee County*, Id. 327). But the legislature may confirm an invalid contract. *Whitewater Valley Canal v. Valette*, 21 How. (U. S.) 414).

See, however, *Beckwith v. Windsor Mfg. Co.*, 14 Conn. 594, which held that a vote of the directors of a corporation, authorizing its president to execute a mortgage in its behalf, need not be under seal.

by the guardians, but no contract was entered into by them under their common seal to pay the price thereof it was held that they were not responsible in their corporate capacity for the payment of this outline map, inasmuch as the preparing of a plan in order to have a parochial assessment made was no part of the duty of the guardians, and was not essential for the carrying out of the purposes or objects for which they were incorporated. (n) But, where iron gates and water-closets were made and erected at the union workhouse, pursuant to an oral order given by the guardians, it was held that the guardians were responsible in their corporate capacity for the payment of the price of them, as they were necessary for carrying out the purposes for which the guardians were incorporated; and it was laid down as a general rule of law by the Court of Queen's Bench that, wherever the purposes for which a corporation is created render it necessary that work should be done and goods supplied, to carry such purposes into effect, and orders are given at a board regularly constituted, and having general authority to make contracts for such work or goods, and the work is done and the goods supplied and accepted by the corporation, and the whole consideration for payment executed, the corporation cannot keep the goods or the benefit, and refuse to pay on the ground that, though the members of the corporation who ordered the goods or work were competent to make a contract and bind the rest, the formality of a deed, or the affixing the seal, were wanting. (o)

(n) *Paine v. Guard. Strand Un.*, 8 Q. B. 326; 10 Jur. 303. *Lamprell v. Billericay Un.*, 3 Exch. 307. *Smart v. Westham Un.*, 10 Exch. 875.

(o) *Sanders v. Guard, St. Neots*, 8 Q. B. 810; 15 L. J., M. C. 104. *Clarke v. Cuckf. Un.*, 21 L. J., Q. B. 354. *Henderson v. Austral. St. Nav. Co.*, 5 Ell. & Bl. 409; 24 L. J., Q. B. 322. *Reuter v. Elect. Tel. Co.*, 6 Ell. & Bl. 341; 26 L. J., Q. B. 46. *Nicholson v. Bradfield Union, L. R.*, 1 Q. B. 620.

Where, therefore, a corporation employed the plaintiff as an accountant to go through its books, and audit its accounts, it was held that the services rendered were essential to the accomplishment of the purposes for which the corporation was created, and that the corporation was responsible upon an implied contract for remuneration. (*p*)

"The appointment of an attorney to conduct important suits affecting the rights and property of a municipal corporation, must, in general, be under seal except in the case of the city of London, who appoint an attorney by warrant of attorney in the queen's bench, every year, without either sealing or signing, and are estopped by the record to say it is not their act." (*q*)¹ Corporations remain always the same as to

35 L. J., Q. B. 176; 7 B. & S. 747. (*q*) Mayor of Thetford's Case, 1 Salk. 192; 3 Id. 103; 2 Raym. 848. Ar-

(*p*) Haigh v. Guard. North Erierly Un., 28 L. J., Q. B. 66. Arnold v. Mayor of Poole, 5 Sc. N. R. 776; 4 M. & Gr. 860.

¹ But as to whether a seal is necessary to such appointment in the United States, see *Curry v. Bank of Mobile*, 8 Port. 360; *American Ins. Co. v. Oakley*, 9 Paige, 496; *Lime Rock Bank v. Macomber*, 29 Me. 564; *Eastman v. Coos Bank*, 1 N. H. 23; *State Bank v. Bell*, 5 Blackf. 127; *Brookville Ins. Co. v. Records*, 5 Id. 170; *Bridgton v. Bennett*, 23 Me. 422; *Mayor, &c. of N. Y. v. Exchange Fire Ins. Co.* 17 How. Pr. 389; *Parker v. Williamsburgh*, 13 Id. 250; *Brady v. Mayor of N. Y.*, 1 Sandford. 562. As to the appointment of agents, and proof of authority, generally, see *Buncombe Turnpike Co. v. McCarson*, 1 Dev. B. 306; *Williams v. Christian Female College*, 29 Mo. (8 Jones) 250; *Richardson v. St. Joseph Iron Co.* 5 Blackf. 146; *Hamilton v. Newcastle, &c. R. R. Co.* 9 Ind. 359. Such authority may be proved by facts and circumstances (*Elysville Mfg. Co. v. Okisko Co.* 5 Md. 152; *Northern, &c. R. R. Co. v. Bastian*, 15 Id. 494); or by acts and general usage (*Badger v. Bank of Cumberland*, 26 Me. (13 Shep.) 458); or inferred from ratification, *Ryan v. Dunlap*, 17 Ill. 40; *Mayor, &c. v. Norman*, 4 Md. 352; *Alabama, &c. R. R. Co. v. Kidd*, 29 Ala. (N. S.) 221; *Planters' Bank v. Bivingsville Cotton Mfg. Co.* 10 Rich. Law, 995.

debts and rights, so that, if an old corporation is incorporated by a new name, it may recover, in its new name, debts contracted with the old corporation. (r) A corporation revived by a new charter has all its rights revived and put in action, and is entitled to the credits of the old corporation, and may therefore sue on a bond given to the old corporation. Where a corporation is created by an act of parliament for particular purposes and with special powers, its deed, though under the corporate seal regularly affixed, does not bind it, if it plainly appears by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*—that is, that the legislature meant that such a deed should not be made. (s) But a corporation is fully capable of binding itself by any contract, except where the statutes by which it is created or regulated, expressly or by necessary implication, prohibit such contract between the parties. (t)

119. *Contracts with trading corporations.*—Where corporations “have been established for the purpose of carrying on trading speculations, and the nature of their constitution has been such as to render the drawing of bills, or the making of any particular sort of contracts, necessary for the purposes of the corporation, the courts have held that they would imply, in those who are, according to the provisions of the charter or act of parliament, carrying on the corporation concerns, an authority to do those acts without which the corporation could not subsist,” (u) and to

(r) *Mayor, &c., of Scarborough v. Co. v. Stewart.* 3 Macq. H. L. C. Butler, 3 Lev. 237; 7 Q. B. 339. 382.

(s) *Parke, B., South York Rail. Co. v. Mayor of Ludlow v. Charlton,* 6 Gt. North Rail. Co., 22 L. J., Ex. M. & W. 821. *South of Ireland Colliery Co. v. Waddle, L. R.,* 3 C. P. 463; 314; 9 Exch. 84.

(t) *Scottish North Eastern Ry. Id.* 1 C. P. 617; 38 L. J., C. P. 338.

do which it was expressly called into existence. The wants and necessities of a body incorporated for the purposes of trade, are, of course, materially different from those of an institution established for municipal purposes and the government of towns and colleges; and if a trading corporation were unable to contract, in the ordinary course of its trade, except under the common seal, its usefulness for trading purposes would be destroyed, and it would be utterly unable to accomplish the object of its existence. It has been held, therefore, that a trading corporation may maintain actions for goods sold and delivered in the usual course of its trade, and may sue upon executory contracts for the supply of goods, for the manufacture and supply of which the company was incorporated, or for the non-acceptance of goods sold, and the non-delivery of goods purchased, by the corporation. (x) It may also draw and accept bills of exchange and promissory notes. (y)¹

Contracts by the officers of trading corporations

(x) *City of Lon. Gas Co. v. Nicholls*, *Gibson v. East Ind. Co.*, 5 Bing. N. 2 C. & P. 365. *Church v. Imp. Gas Co.*, 6 Ad. & E. 859; 3 N. & P. 37. (y) *R. v. Bigg*, 3 P. Wms. 419. *Eddie v. East India Co.*, 2 Burr. 1216.

¹ *Hamilton v. Newcastle R. R. Co.* 9 Ind. 359; *Carne v. Brigham*, 39 Me. 35; *Clark v. School Dist. &c.* 3 R. I. 199; *Barker v. Mechanics', &c. Ins. Co.* 3 Wend. 94; *Moss v. Oakley*, 2 Hill, 265; *Hardy v. Merriweather* 14 Ind. 203; *McMasters v. Reed*, 1 Grant's Cas. 36; *Kelley v. Mayor of Brooklyn*, 4 Hill, 263; *Smith v. Eureka Flour Mills*, 6 Cal. 1; *Partridge v. Badger*, 25 Barb. 146. *Buckley v. Briggs*, 30 Mo. 452; and it has been held, that where a corporation has a power to make a purchase, it may lawfully make promissory notes on time for the price of the purchase, or, generally, for any legitimate purpose of the corporation. *Moas v. Averill*, 10 N. Y. 449; *Clark v. Farmers' Woolen Mfg. Co.* 15 Wend. 256; *Commercial Bank v. Newport Mfg. Co.* 1 B. Mon. 13; *Dubois v. N. Y. & Harlem R. R. Co.* 1 N. Y. Leg. Observer, 362.

are not binding upon the corporation, unless they are within the scope of their regular employment. (z) A station-master, guard, or clerk of an incorporated railway company, for example, has no implied authority to employ surgeons, and procure medical attendance for injured passengers; (a) but the company is liable where their credit is pledged for such services by the general manager. (b) A clerk charged with the payment of wages, or a secretary or law agent of a company, has no power to bind the company by statements or representations, acts or proceedings, beyond the limit of his ordinary duties, and the scope of his regular employment. (c) Where a contract for the performance of work and the supply of materials was entered into under the common seal, and extra work, not included in the contract, was ordered by the company's engineer, and performed, it was held that the company was not responsible for the payment of such extra work. (d)

120. Informal contracts, where the company has had the benefit of the performance of the contract.—

But wherever the purposes for which a corporation is created render it necessary that work should be done, or goods supplied to carry such purposes into effect, and orders are given, by persons having an apparent general authority to make contracts for work or goods necessary for the purposes for which the corporation was created and the work is done, or goods supplied, and accepted by the corporation, the corporation can

(a) *Williams v. Chester & Holyhead Rail. Co.*, 15 Jur. Ex. 828. *Cope v. Thames Nav., &c.*, 3 Exch. 841; 18 L. J. Ex. 345. *Diggle v. Lond. & Black. Rail Co.*, 19 L. J., Ex. 308.

(b) *Cox v. Mid. C. Rail. Co.*, 3 Exch. 273; 18 L. J. Ex. 65

(b) *Walker v. Great Western Ry. Co.*, L. R., 2 Ex. 228; 36 L. J. Ex. 123.

(c) *Burnes v. Pennel*, 2 H. L. C. 497. *Olding v. Smith*, 16 Jur. 500.

(d) *Homersham v. Wolverhampton, &c., Co.*, 6 Exch. 137.

not keep the goods or the benefit of the work, and refuse to pay on the ground that the formality of a deed was wanting. (*e*) And, wherever a company has been incorporated for carrying on a particular business, and services have been rendered in the direct course of the business which, by their charter, they were to carry on, and the contract for those services has been recognized and adopted at a general meeting of the company, it is not competent to the company to repudiate their liability, and refuse payment for the services rendered, on the ground that the contract was not made in conformity with the provisions of the act of incorporation. (*f*)¹

121. *Contracts with registered joint-stock companies.*—The companies act, 1862 (25 & 26 Vict. c. 89), enables seven or more persons, by subscribing their names to a memorandum of association, and complying with the requisitions of the act in respect of registration, to form themselves into an incorporated company, with unlimited liability, or with liability limited by shares or by guarantee, and prohibits more than ten persons from carrying on in partnership the business of banking, and more than twenty persons from carrying on any other business having gain for its object, (*g*) unless they are registered as a company under that act, or under some previous act, (*h*) or are authorized so to carry on business by act of parliament, or letters patent, or are engaged in working mines within, and subject to the

(*e*) Ante, pp. 84, 85. Pauling v. (g) Moore v. Rawlins, 6 C. B., N. Lond. & N. West. R. Co., 8 Exch. 867. S. 289; 28 L. J., C. P. 247.

(f) Reuter v. Elect. Tel. Co., 6 Ell. (h) Wormsley v. Merritt, L. R., 4 & Bl. 349; 26 L. J., Q. B. 46. Ante, Eq. 695; 37 L. J., Ch. 19. p. 186-188.

¹ See Bank of South Carolina v. Hammond, 1 Rich. 281; Southern Life Ins. &c. Co. v. Lanier, 5 Fla. 110.

jurisdiction of, the stannaries. The leading purpose of this statute is to enable a permanent company, consisting of changing members, to make binding contracts, and sue and be sued, and do all the usual acts necessary for carrying on trade. The first part provides for the formation of the company, through the medium of a memorandum and articles of association, the essential requisites of which relate almost exclusively to the rights and duties of directors and members inter se, regulating the name of the company, the objects for which the company is established, the limited or unlimited liability of the members, the amount of the capital, the number and amount of the shares, the transfer of shares, the registration of members, and the meetings and proceedings of the company. After registration of the memorandum of association, a certificate of the incorporation of the company is to be granted; and thereupon, by s. 18, the company becomes incorporated, having perpetual succession and a common seal, with power to hold lands. The certificate of incorporation is conclusive evidence that all the requisitions of the act, in respect of registration, have been complied with. (i)

122. *Requisites of contracts with registered joint-stock companies.*—Before the passing of the 30 & 31 Vict., c. 131, companies could only contract without seal, where the company was a trading company, and the contract was, for a purpose, connected with the objects of the corporation. (k) But now, contracts on behalf of a joint-stock company, registered under the 25 & 26 Vict., c. 89, may be made (30 & 31 Vict., c. 131, s. 37) as follows:—Any contract which, if made

(i) *Oakes v. Turquand*, L. R. 2 H. L. 325; 36 L. J., Ch. 949. *Peel's case*, 36 L. J., Ch. 757; L. R. 2 Ch. 674.

(k) *South of Ireland Coll. Co. v. Waddell*, L. R., 3 C. P. 463; 4 C. P. 617 38 L. J., C. P. 338.

between private persons, would be by law required to be in writing, and if made according to English law, to be under seal, may be made on behalf of the company in writing, under the common seal of the company, and may, in the same manner, be varied or discharged. If it is such a contract as is required by law to be in writing, and signed by the parties to be charged therewith, it may be made on behalf of the company in writing, signed by any person acting under the express or implied authority of the company, and may, in the same manner, be varied or discharged. If it would by law be valid, as between private persons, although made by parol and not reduced into writing, it may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and may, in the same manner, be varied or discharged. All contracts so made are binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators.

The company may, by instrument in writing, under their common seal, employ any person (s. 55), either generally or in respect of any specified matters, as their attorney, to execute deeds on their behalf in any place not situated in the United Kingdom; and every deed signed by such attorney on behalf of the company, and under his seal, is binding on the company to the same extent as if it were under the common seal.¹ The 27 Vict., c. 19, moreover enables joint-stock companies, carrying on business in foreign countries, to have official seals to be used in those countries.

123. *Contracts by agents.*—Where a company, through their directors, hold out an officer of the company as their agent for a particular purpose,¹ they can

¹ See note 2, p. 100.

not afterwards dispute acts done by him within the scope of such agency; (*l*) but, where an advance has been made on the personal responsibility of the agents of the company, a subsequent adoption of their acts, by the directors, will not make the company liable. (*m*)¹

124. *Contracts in violation of the provisions of the articles of association.*—Parties dealing with the directors of a joint-stock company are bound to take notice that they are dealing with parties having a limited authority; and they are bound by the limitation of authority contained in the registered articles of association, (*n*) unless the company at large, or the general body of the shareholders, have sanctioned acts and transactions by the directors in excess of the powers conferred upon them. If a company has no power to do a particular thing, that power can not be added to the company by the agreement of the shareholders; but, if a company has power to do a thing, and there be only requisite a particular formality, such as the consent of a general meeting, in order to warrant the exercise of the power, then acquiescence may be inferred from delay, and a knowledge of the transaction imputed to every shareholder; (*o*) and an agreement originally ultra vires can not be impeached after the lapse of considerable time. (*p*) Where the deed of settlement of a fire insurance company

(*l*) *Wilson v. West Hartlepool Harbor and Ry. Co.*, 34 Beav. 187; 2 De G. J. & S. 475.

(*m*) *Scott v. Lord Ebury*, L. R., 2 C. P. 255; 36 L. J., C. P. 161.

(*n*) *Balfour v. Ernest*, 5 C. B., N. S. 624; 28 L. J., C. P. 170. *Shrewsbury (Earl) v. North Staffordshire Ry. Co.*

L. R., 1 Eq. 593; 35 L. J., Ch. 596.

(*o*) *British Provident Life & Fire Ins. Soc.*, in re, 32 L. J., Ch. 326. But see *Brotherhood*, in re, ex parte *Agriculturist's Insurance Co.*, 31 Beav. 365.

(*p*) *Smallcombe's case*, L. R., 3 Eq. 769.

¹ See note 2, p. 100.

directed that, in every policy issued by the directors, the funds of the company should alone be made answerable for claims under such policy, and policies were issued by the authority of the directors not confining the liability to the funds of the company, and not complying with the provisions of the deed of settlement in other respects, it was held that the policies were not binding upon the company. (q) But it does not follow that a deed under the seal of the company, bona fide entered into, is absolutely void if any formality which is prescribed by the articles of association has been omitted. To hold this to be the case would have the effect of vesting in these companies "an unlimited power of repudiation;" and this would be an unlimited power to defraud. (r) There may be a breach of duty on the part of the directors, in neglecting to comply with certain formalities, in respect of which they are responsible to the shareholders; but it does not follow that the contract is void as against the company. (s)¹

Where a harbor company was empowered by act of parliament to raise money by mortgage, and it was provided that the mortgages should be entered in the books of the company by their clerks, who were to indorse on such mortgages a memorandum of such entry, and it was also provided that, until the entries and indorsements were made, the mortgages should "not be valid or effectual," and money was borrowed by the company on mortgage, and the mortgage was

(q) *Hambro' v. Hull & Lond. Fire Ins. Co.*, 3 H. & N. 789; 23 L. J., Ex. 62.

(r) *Ld. Campbell, Prince of Wales Ins. Co. v. Harding, Ell. Bl. & Ell.* 116; 27 L. J., Q. B. 307.

(s) *Agar v. Athenæum Life Ass. So.*, 3 C. B., N. S. 756. *Totterdell v. Fareham Blue Brick and Tile Co.*, 35 L. J. C. P. 278. *In re Bonelli's Telegraph Co.*, L. R., 12 Eq. 246; 40 L. J., Ch. 567.

¹ *State v. Conklin*, 34 Wis. 21.

entered in the company's books, but no memorandum of such entry was indorsed on the mortgage by the clerk, pursuant to the requirements of the act of parliament, it was nevertheless held that the company could not set up their non-compliance with the act in order to defeat the claim of their mortgagee; for it was obvious that the legislature never intended to put it in the power of the company to defeat their own securities by their own default, and so commit a gross fraud. (t)

The power of giving a bill of sale as a security for debts is incident to a trading company, although it is not expressly conferred by the articles of association. (u)

Parties who have contracted with the directors of a registered joint-stock trading company, in matters relating to the copartnership business, are not bound, when seeking to enforce their contracts against the company, to show that the directors were authorized by the articles of association to enter into them. Prima facie the directors have the necessary authority; and the burden of proving that the directors were restrained by the regulations of the company from making the particular contract sought to be enforced, and from binding the company thereby, lies upon the defendants. If managers, secretaries, or directors, are appointed to carry on the business of a trading company, parties dealing with the company are not bound to inquire whether their agents or officers are properly appointed or not. If they exercise the duties of their office notoriously, and order goods which are received and used by the company in the ordinary course of its business, the company is responsible for payment thereof. (x) But, if the contract sued upon has no

(t) *Jorten v. S. E. R. Co.*, 6 De G. M. & G. 270; 24 L. J., Ch. 343. *Prince of Wales Ass. Co. v. Harding*, Ell. Bl. & Ell. 183.

(u) *Shears v. Jacobs*, L. R., 1 C. P. 513.

(x) *Smith v. Hull Glass Co.*, 8 C. B. 676; 19 L. C. P. 155; 11 C. B. 897

relation to the business carried on by the company, and is not within the scope of any implied authority given for the purpose of managing and conducting the business thereof, the plaintiff is bound to prove affirmatively that the directors who profess to bind the company by the contract were duly authorized to do so. This may be done by showing that any particular course of dealing has been sanctioned by the directors and acquiesced in by the shareholders, or that the unusual contract has been sanctioned by a board meeting at which the requisite number of directors was present.

(*y*) Persons employed by the directors of a company to supply goods, or to render any services for the purposes and requirements of the company, can not be expected nicely to investigate the objects for which they are employed, and to resort, in every case, to the deed of settlement for the purpose of ascertaining whether those objects are or are not in accordance with its provisions and with the trusts reposed in the directors. (*z*) But, whenever a party dealing with a joint-stock company knowingly combines with the directors to do any act *ultra vires* to the prejudice of the shareholders, then the shareholders may very fairly deny their liability. (*a*)¹

21 L. J., C. P. 110 *Lillard v. Bourne*,
15 C. B. 472, *Levy v. Metrop; Cab.*
Co., 23 Law T. R., C. P. 67.

(*s*) *Green v. Nixon*, 3 Jur. N. S. 994;
27 L. J., Ch. 819.

(*y*) *Ridley v. Plym. Grind. &c.*, 2
Exch. 716; 17 L. J., Ex. 252.

(*a*) *Prince of Wales Ins. Co. v*
Harding, Ell. Bl. & Ell. 217; 27 L. J.,
Q. B. 307.

¹ See *McSpedon v. Mayor, &c. of N. Y.* 7 Bosw. 601; 20 How. Pr. 395; *Hood v. New York, &c. R. R. Co.* 22 Conn. 502; *Whitman, &c. Co. v. Baker*, 3 Nev. 386; *Farmers' &c. Bank v. Detroit, &c. R. R. Co.* 17 Wis. 372; *Bissel v. Michigan, &c. R. R. Co.* 22 N. Y. 285; *Whitney v. Reay*, 24 Ark. 26; *De Voss v. City of Richmond*, 18 Gratt. 338; *Jones v. Same*, Id. 517; *Trenton Ins. Co. v. McKelway*, 1 Beasley, 133; *Attorney-General v. Hushon*, 18 N. J. Eq. (3 C. E. Green 410); *Fisk v. Chicago, &c. R. R. Co.* 4 Abb. Pr. (N. S.) 378

125. *Liability of shareholders.*—Every company, limited under the act, whether limited by shares or by guarantee (s. 41), must keep its name painted or affixed in a conspicuous position, and in letters easily legible, on the outside of its office or place of business, and must have its name in legible characters on its seal, and on all its notices, advertisements, and official publications, and in all its bills, notes, indorsements, checks, orders, bills of parcels, invoices, receipts, and letters of credit. All officers of the company, and persons acting on its behalf, disobeying the statute, are subjected (s. 42) to various personal liabilities in respect of their contracts and proceedings in the matter. (b) If the company carries on business for a period of six months, after the number of the members has been reduced to seven, every person who is a member, during that period, is liable (s. 48) for the whole debts of the company then contracted.¹

126. *Effect of the winding-up order.*—Bona fide dispositions of property of a company, in the ordinary course of its trade, made after the presenting of a petition for winding-up, and completed before the winding-up order, will, in the exercise of the discretion given to the court by the Companies act, s. 153, be confirmed. Where, however, such dispositions are incomplete, and rest in contract at the time of the winding-up order, the court has no discretionary power to order the contract to be fulfilled; and the person with whom it was entered into, though he has paid

(1) *Penrose v. Mastyn*, 28 L. J., Q. B. 28; Ell. Bl. & Ell. 499.

¹ In the United States the liability of stockholders is generally regulated by statutes of the different states. See these laws collated and referred to *post*, part ii. book ii. chapter vii section

his money has only a general claim, as a creditor, for damages in respect of the breach of contract. (c)¹

Where a customer of a trading company had bona fide ordered and paid for goods, and the company had loaded the goods on a railway to his address, and sent him the invoices, after the presenting of the petition, but before the winding-up order, it was held that the disposition of the property was complete before the winding-up order, and the goods were ordered to be delivered to the customer. (cc)

127. Contracts with official and other liquidators are regulated by the 25 and 26 Vict. c. 89. (d) A liquidator appointed under a resolution to wind-up voluntarily is not personally responsible to the solicitor employed by him on the affairs of the liquidation for any of the costs of such liquidation. (e) Where a company is being voluntarily wound up, and there are four liquidators, one of them can not, in the absence of any authority from the company, and solely upon the strength of a resolution of his coliquidators, accept bills on behalf of the company. (f)²

128. *Contracts with railway companies.*—Where a public act of parliament limits and defines the authority of a railway company, and provides for the application of all the funds that come into the hands of the corporation or the directors, a contract for the

(c) *Wiltshire Iron Co., in re, ex parte Pierson*, L. R., 3 Ch. 443.

(cc) *Wiltshire Iron Co. in re, ex parte Pierson*, 1 L. R., 3 Ch. 443.

(d) See sects. 99 and 133.

(e) *In re Trueman's estate, Hooke v. Piper* L. R., 14 Eq. 278; 41 L. J., Ch. 585.

(f) *London & Mediterranean Bank, in re, ex parte Birmingham Banking Co.*, L. R., 3 Ch. 651; 36 L. J., Ch. 807. *Ex parte Agra and Masterman's Bank*, L. R., 6 Ch. 206. *Bolognesi's case*, L. R., 5 Ch. 567; 40 L. J., Ch. 26.

¹ See *post*, "Winding-up of Joint Stock Companies," part ii book ii. chapter vii. section

² See *post*, book ii. chapter vii.

accomplishment of objects not sanctioned by the act of parliament is illegal and void; (*g*) and the assent of all the shareholders to such a contract, though it may make them all personally liable to perform the contract, will not bind them in their corporate capacity, or render liable the corporate funds. (*h*) Incorporated railway companies have no existence independently of the acts which create them; and they are created by parliament with special and limited powers and for limited purposes. When, therefore, they exceed, or attempt to exceed, their powers, they are acting in contravention of the law which established them, and in opposition to what courts of justice are bound to consider to have been the intention of parliament in their creation. (*i*)¹

A railway company incorporated by a special act of parliament, containing the usual clauses inserted in such statutes, can not accept bills of exchange. (*k*)²

129. *Contracts by the promoters of a railway made before incorporation*, for the purpose of procuring the act of incorporation and establishing the undertaking, cannot be enforced against the company, (*l*) unless they have been adopted and acted upon by the company after it has obtained its act of incorporation, (*m*) or the engagement is embodied in the act itself.

130. *The power of directors and committees of directors to make contracts on behalf of the company*

(*g*) Taylor v. Chichester & Midhurst Ry. Co., L. R., 2 Ex. 356; 36 L. J., Ex. 201. Atty. Gen. v. Great Northern Ry. Co., 1 Drew. & Sm. 154.

(*h*) Colman v. Eastern Counties Ry. Co., 10 Beav. 1.

(*i*) Shrews & Birm. Rail. Co. v. Lond. & N. W. Rail. Co., 22 L. J., Ch. 683. East. Angl. Rail. Co. v. East. Co.,

11 C. B. 775; 21 L. J., C. P. 23. Norw. v. Norf. Rail. Co., 1 Jur. N. S. 348.

(*k*) Bateman v. Mid-Wales Ry. Co., L. R., 1 C. P. 499; 35 L. J., C. P. 205.

(*l*) Caledon. & Dumb. Rail. Co. v. Helenburgh May., 2 Macq. 409.

(*m*) Williams v. St. George's Harbor Co., 27 L. J., Ch. 691.

¹ See *post*, book ii. chapter vii.

² Id.

may be lawfully exercised as follows:—With respect to any contract which, if made between private persons, would be by law required to be in writing, and under seal, the committee or the directors may make such contract, on behalf of the company, in writing, and under the common seal of the company, and in the same manner may vary and discharge the same. With respect to any contract which, if made by private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, the committee or the directors may make such contract on behalf of the company, in writing, signed by such committee, or any two of them, or any two of the directors, and in the same manner may vary and discharge the same; and with respect to any contract which, if made between private persons, would by law be valid, although made by parol only, and not reduced into writing, the committee or the directors may make such contract on behalf of the company, by parol only, without writing, and in the same manner may vary and discharge the same. (n) These enactments are affirmative only, and do not preclude the enforcement against a company of the ordinary equity based on part performance. (o)¹

(n) 8 & 9 Vict. c. 16. s. 97.

& Harbor Co., 34 L. J., Ch.

(o) *Wilson v. West Hartlepool Ry.* 241.

¹ In the United States, directors of corporations, or joint stock companies are limited in their powers to contract for the company, to the powers conferred upon them by the legislature creating them, or by their charters and by-laws. A formal meeting is not necessary to enable them to do any acts thus within their corporate powers (*Waite v. Windham County, &c. Co.* 37 Vt. 608). The power may be exercised by a majority of the body (*Dram v. Bangor, &c. Proprietary*, 12 Me. (3 Fairf.) 354). And see generally *Savage v. Ball*, 17 N. J. Eq. (2 C. E. Green) 142; *Hartford Bridge Co. v. Granger*, 4 Conn. 142; *New Haven, &c. v. Hayden*, 107 Mass. 525; *McCullough v.*

131. *Informal contracts for services by railway companies.*—By s. 91 of the companies clauses consolidation act, 1845, "the determination as to the remuneration of the auditors, treasurer, and secretary, shall be exercised only at a general meeting of the company." If, however, the company does not think fit to make its determination known at a general meeting, and the directors contract with a secretary to give him a certain salary, and the secretary serves the company under the contract, it is no answer to an action against the company, for the stipulated remuneration, to say that the remuneration he is to receive has never been determined by a general meeting of the company. (p)

132. *Of contracts with copartnerships and associations authorized to sue and be sued in the name of their secretary, treasurer, or public officer.*—In order to obviate inconveniences ensuing from changes in the members, and technical objections arising from the non-joinder as plaintiffs in an action upon a contract of all who were partners at the time the contract was entered into, acts of parliament have, from time to time, been procured, empowering certain banking, trading, insurance, and other companies and copartnerships, to sue and be sued in the name of their managing officer, or their treasurer or secretary for the

(p) *Bill v. Darenth Ry. Co.*, 1 H. & N. 305; 26 L. J., Ex 81.

Talladega Ins. Co. 46 Ala. 376; *Dabney v. Stevens*, 2 Sweeny, (N. Y.) 415; 10 Abb. Pr. N. S. 39; 40 How. Pr. 340; *Brooklyn, &c. Road Co. v. Slaughter*, 33 Ind. 185; *Marshall, &c. School Co. v. Iowa, &c. Synod*, 28 Iowa, 360; *Lightner v. Brooks*, 2 Cliff. 287; *Simons v. Vulcan Oil, &c. Co.* 61 Pa. St. 202). And directors of a corporation are chargeable with knowledge of the provisions of the law regulating their duties, or imposing liabilities upon them (*Van Etten v. Eaton*, 19 Mich. 187). A director cannot make a note to bind the company without special authority (*Lawrence v. Gebhard*, 41 Barb. 575).

time being, and providing that the actions so brought shall not abate or be discontinued by the death or removal of such nominal plaintiff whilst the action is pending. The right of action of the public officer is not affected by a change in the name of the firm, or the accession of new partners or shareholders; (*q*) and it is, in general, absolutely vested in him, so that the action upon all contracts (entered into with the directors and trustees) must be brought in his name, and not in the names of those who are the actual parties to the contract. (*r*) Therefore, where a covenant was entered into with several of the copartners of such a copartnership nominatim, it was held that the action upon the covenant must nevertheless be brought by the public officer, and that the covenantees could not sue, in their own names, upon the covenant, the words "shall and may," in the acts creating these copartnerships, and vesting the right of action in the public officer, being obligatory and not merely permissive. (*s*) But the power of entering into contracts on behalf of the company is not transferred to such treasurer, secretary, or public officer, but continues to reside with the directors, in whose hands the management of the copartnership is placed. The extent of the right of action of the public officer generally depends upon the construction of acts of parliament, the words of which are sometimes very large, vesting in him the right to sue upon all contracts in which the company is "concerned or interested," or which have been entered into "with any person in trust for

(*q*) *Wilson v. Craven*, 8 M. & W. 584.

(*r*) *Steward v. Greaves*, 10 M. & W. 719.

(*s*) *Chapman v. M'lvain*, 5 Exch.

61; 19 L. J., Ex. 228. *Wills v. Sutherland*, 4 Id. 211. As to the death or removal of the officer during the pendency of an action, see *Barnewall v. Sutherland*, 9 C. B. 380.

the company," or "with any person for the use or benefit of the company." (*t*)

133. *Liability of the public officer.*—The secretary clerk, or public officer of a company authorized by act of parliament to be sued in the name of a clerk, secretary, public officer, or other nominal defendant, is not, in general, personally responsible upon a judgment obtained against him, (*u*) unless he is a member of the company, and responsible as such upon the judgment. (*x*)

134. *Contracts with the managers and shareholders of mining companies.*—Shareholders in mining companies, carried on on the cost-book principle, are co-adventurers together; but they are not clothed with the ordinary liabilities of copartners. One shareholder, for example, has no power of binding another by contract, unless he has been appointed a manager of the mine. The shareholders, moreover, are not liable upon bills or notes drawn, accepted, or made by the purser, or managers, or directors of the company, or for money borrowed by them, or their resident agent or manager, for the purpose of paying the wages of servants or workmen, or for the general purposes of the association. (*y*) And there is not, it seems, as between the managers and directors of the company, any implied authority from one manager to another to draw or accept bills or make promissory notes for the purposes of the company, so as to bind the other managers without their knowledge and express concurrence. (*z*) But a manager who accepts bills of

(*t*) *Skinner v. Lambert*, 5 Sc. N. R. 197. *Smith v. Goldsworthy*, 4 Q. B. 461.

(*u*) *Wormwell v. Hailstone*, 4 M. & P. 512. *Harrison v. Timmins*, 4 M. & W. 510.

(*x*) *Harwood v. Law*, 7 M. & W. 203.

(*y*) *Hybart v. Parker*, 4 C. B., N. S. 209; 27 L. J., C. P. 120.

(*z*) *Ricketts v. Bennett*, 17 L. J., C. P. 19; 4 C. B. 666. *Hawthorne v.*

exchange for the company will himself be responsible upon the acceptance, if he has accepted without any authority from the company on whose behalf he professed to act. (a) Those persons, also, who take an active part in the management of the mine, who personally give orders for the supply of machinery, or who are present at meetings when machinery is ordered, or who receive a share of the profits of the mine, or who agree to furnish capital and receive profits, if profits are realized, are responsible for the payment of the price of things ordered and consumed in the ordinary business of the company. (b)¹

135. *Who is a shareholder.*—A written acceptance of shares in a mining company, signed by the defendant, is evidence against him of his being a shareholder. (c) If his name is entered in the books of the company, amongst the names of the shareholders, with his knowledge and concurrence, or if he has admitted

- Bourne, 7 M. & W. 595. Brown v. 220; 5 Bing. 521. Steigenberger v. Byers, 16 M. & W. 262. Dickenson Carr, 3 Sc. N. R. 466. Tredwen v. Valpy, 10 B. & C. 128. Burmester Bourne, 6 M. & W. 465. Hawken v. Norris, 6 Exch. 796; 21 L. J., Ex. 43. Bonrne, 8 M. & W. 710. Peel v. Thomas, 15 C. B. 714; 24 L. J., C. P. 86.
 (a) Owen v. Van Uster, 10 C. B. 318; 20 L. J., C. P. 61. (c) Toll v. Lee, 4 Exch. 230; 18 L. J., Ex. 364.
 (b) Ellis v. Schmoëck, 3 M. & P. J., Ex. 364.

¹ In the United States some differences exist in the law, as applied to mining companies—*e. g.* the Massachusetts act (stat. 1862, ch. 218)—which provides that the officers of manufacturing corporations shall be liable for the debts of the corporation in certain cases, has been held not to apply to mining corporations (Byers v. Franklin Coal Co. 106 Mass. 131). And see as to regulations affecting mining companies in Pennsylvania (Densmore Oil Co. v. Densmore, 64 Pa. St. 43; Reading, &c. Co. v. Graeff, Id. 395; Roberts' Appeal, 60 Pa. St. 400; Franks Oil Co. v. McCleary, 63 Pa. St. 317). In Ohio (Miami Coal Co. v. Wigton, 19 Ohio St. 560); Maryland (Bassher, v. Dressel, 37 Md. 503). And see *post*, part iii. book ii ch. i., and part iv. book ii. ch. iv.

that he is a shareholder, there is proof against him of his being a shareholder, although it can not be shown that he has actually received profits or obtained any dividend upon his shares. (*d*) If, however, no share in the mine, or right to share in the profits thereof, has been actually transferred to him, and he is not in reality a holder of shares, and has no legal interest in the concern, and has not acted as an ostensible partner, he will not be responsible as a partner; and no acknowledgment, made under a mistaken supposition of his own that he is a shareholder when he is not a shareholder, will make him liable, unless it were communicated to the plaintiff so as to mislead him. (*e*) Although the property in mining shares may pass by delivery of the certificates of proprietorship, yet the holder of the certificates does not, in general, become a shareholder until his name is entered in the share register book; and the vendor of mining shares is not, in general, discharged from liability as a shareholder until his name has been expunged from the book. (*f*)

136. *Insurance companies* are frequently constituted, and the policies issued by them framed, upon the terms that a certain specified, subscribed capital, and the stocks, funds, securities, and property of the company, shall alone be liable to make good claims arising upon their policies, that the directors signing the policies shall not be responsible to any greater extent than the funds or property in their hands or power shall be competent to discharge, and that no proprietor shall, in any event whatever, be liable beyond the amount of the unpaid part of his share in the subscribed capital stock of the company. When

(*d*) *Ralph v. Harvey*, 1 Q. B. 845.

(*f*) *Humby, ex parte*, 28 L. J., Ch.

(*e*) *Vice v. Lady Anson*, 7 B. & C. 875.

this limitation of liability is made an express term of contracts entered into between the company and third parties, these last are of course bound thereby; and, when the capital stock has been subscribed and expended, the directors and shareholders are relieved from liability upon the contract. (*g*) So long, however, as the shareholders have not paid up the whole of their shares, and the capital stock is not all expended, the directors who seal or sign the policy are liable thereon; and they must provide funds by making call on the shareholders. (*h*) Where certain directors of an insurance company, by policy under seal, ordered, directed, and appointed that the capital, stock, and funds of the company should stand charged with, and be liable to pay, £500 to the plaintiff, it was held that this was a personal covenant on the part of the directors to pay if the funds proved adequate, and that they were individually liable thereon, unless they could show that the company was insolvent. (*i*) In a contract of this kind the whole body are not made joint contractors; but each individual of the company is bound to make good the loss in the same proportion as his share bears to the total capital, in the nature of a separate underwriter; and the individual proprietors are not responsible for any others than themselves. (*k*) If the limitation of liability is not made part of the contract with the company, and the parties dealing with the company have no notice of it, they will of course not be bound by it. (*l*) A policy under the

(*g*) *Halket v. Mercht. Trad., &c.*, 13 Q. B. 960. *Hassell v. Id.*, 4 Exch. 529. *Hickman v. Cambrian, &c. Ins. Co.*, 28 L. J., Ex. 379. *Prince of Wales, &c. Ass. Co. & Athenæum Socy.*, in re, Id. Ch. 335.

(*h*) *Andrews v. Ellison*, 6 Moore, 206.

(*i*) *Gurney v. Rawlins*, 2 M. & W. 90. *Dawson v. Wrench*, 3 Exch. 359.

(*k*) *Hallett v. Dowdall*, 18 Q. B. 2; 21 L. J., Q. B. 98. *Reid v. Allan*, 4 Exch. 326.

(*l*) *Gordon v. Sea, &c. Ins. Soc.*, 1 H. & N. 599; 26 L. J., Ex. 202. *State Fire Ins. Co.*, 32 L. J., Ch. 300.

seal of the company cannot be avoided merely by showing that some of the formalities required by the deed of settlement, in order to render the contract binding on the company, have not been complied with.

(*m*) But an ordinary local agent of an insurance company is not, without special authority, authorized to bind the company by a contract to grant a policy.

(*n*)

137. *Of contracts with banking copartnerships.*—

The mere shareholders of a copartnership under the management of trustees or directors have no authority to contract for one another, or to pledge the credit of the copartnership; (*o*) but the directors appointed to carry on the business have impliedly all such of the ordinary powers of partners in a common mercantile partnership as are necessary for carrying on the business for which the company is formed; and where a banking copartnership is established, the directors are considered the agents of the shareholders to borrow money for the ordinary purposes of the business, and to give securities in the ordinary form for the money borrowed, unless the power is excluded by the express provisions of the deed of settlement. They have authority, therefore, to give promissory notes, or to accept bills of exchange, so as to bind themselves and the other shareholders, and, if there is any objection in point of form to the validity of the bills or notes, the money obtained upon them by the directors may be recovered as money lent to the company. If there is any irregularity in the transaction, and the shareholders lie by and acquiesce in the irregularity, they will be deemed to have subsequently ratified the acts

(*m*) *Prince of Wales Ass. Co. v. Harding, Ell. Bl. & Ell. 217; 27 L. J., Q. B. 307.*

(*n*) *Linford v. Provincial Horse &c. Ins. Co., 34 Beav. 291.*

(*o*) *Burnes v. Pennell, 2 H. L. C. 521.*

of the directors. (*p*) If the manager of the bank is intrusted with a general power of accepting, making, and indorsing bills and notes, an innocent indorsee will not be prejudiced by any irregularity in his mode of exercising it; but, if he has only a special and limited authority, and the indorsement conveys an express intimation to that effect, the indorsee must, at his peril, make inquiry as to whether or not the authority has been properly exercised, before he advances his money upon, or gives credit to, the indorsement. (*q*)

138. *Banking copartnerships established under the 7 Geo. 4, c. 46*, are authorized (s. 9) to sue and be sued in the name of one of the public officers as the nominal plaintiff or defendant; and every judgment and decree obtained against the public officer is to operate (s. 12) as a judgment against the copartnership, and execution may be issued thereon (s. 13) against any copartner for the time being; and, if the judgment is not satisfied, it may then be issued against any person who was a member of the copartnership at the time when the contract on which such judgment was obtained was entered into, or became a member at any time before such contract was executed, or was a member at the time such judgment was obtained provided leave is granted by the court in which the judgment was obtained, after notice to the person sought to be charged, and before the expiration of three years from the time such person shall have ceased to be a member of the copartnership. (*r*)

(*p*) *MacLae v. Sutherland*, 3 Ell. & Bl. 1; 23 L. J., Q. B. 229. *Bank of Australasia v. Bank of Australia*, 12 Jur. 195.

(*q*) *Alexander v. Mackenzie*, 6 C. B. 766. *Eyre v. McDowell*, 14 Ir. C. L. R. 332. *Stagg v. Elliott*, 12 C. B. N. S. 375; 31 L. J., C. P. 260.

(*r*) *Parke, B., Dodgson v. Scott*, 17 L. J., Ex. 326. See the 7 & 8 Vict. c. 113, s. 47, as to banking co-partnerships carrying on business within sixty-five miles of London. See also the 27 & 28 Vict. c. 32, as to banks which have discontinued the issue of their own bank-notes.

139. *Liabilities of banking copartnerships for frauds by their agents.*—Where a banking copartnership, under the 7 Geo. 4, c. 46, was in the habit of receiving deposits of money from their customers, and allowing interest on the deposit, and the manager of the bank received a deposit of money from a lady, and gave her a deposit receipt, and at a subsequent period represented to her that a higher rate of interest might be obtained for her money if she purchased some houses on which the bank had a mortgage, and paid off the mortgage, and the lady accordingly brought her deposit receipts to the bank, and drew out her money, and handed it over to the manager to be applied in the way indicated by him, but the latter absconded with the money, it was held that the bank was responsible for the loss, as the manager had all along been intrusted with the money as their agent. (s) But, where one of several partners in a bank induced a customer to draw her money out of the bank and lent it to his own son, on the security of the son's note of hand and his (the partner's) own guarantee, and the partner and his son both became insolvent, and the securities were worthless, it was held that the banking firm was not responsible for the money, as the investment was a private transaction between the customer and the individual partner who was avowedly acting in the matter on his own private account, and not on behalf of the bank. (t)

140. *Liabilities of provisional directors and committeemen.*—All persons who take an active part in working out a project, who attend meetings at which resolutions are made, or orders given, for the employment of agents or servants, or the supply of goods in

(s) *Thompson v. Bell*, 10 Exch. 10;
23 L. J., Ex. 321.

(t) *Bishop v. Countess of Jersey*, 23
L. J., Ch. 483.

furtherance of a joint undertaking, render themselves in general jointly responsible for the remuneration and payment of the services rendered, or goods supplied, in obedience to the orders so given. (u) Every person, also, who holds himself out, or permits himself to be published to the world, as one of the acting committeemen or managers of a projected company, may become chargeable to parties who, subsequently to such announcement, have dealt with the managing committee; and all the actual and publicly reputed managers may become responsible upon orders given, or contracts entered into, by the managing committee, at meetings at which they have not been present, but not for things done pursuant to orders given before they became acting members or managers. (x) Where the plaintiff and the defendants were desirous of starting a company to take the plaintiff's premises and stock-in-trade, and the plaintiff sent a written proposal to the defendants for the sale of his extra stock, and they sent the plaintiff a written acceptance thereof, and the proposal was directed to and accepted by the defendants "on behalf of the proposed G. R. A. H. Co. (Limited)," it was held that, as the company was non-existent at the time of the agreement, the defendants were personally liable, and that parol evidence was inadmissible to show a contrary intention. (y)

One member of a managing committee has, in general, no authority to bind another member. If the business of the company has always been trans-

(u) *Braithwaite v. Skofield*, 9 B. & C. 402. *Lake v. Duke of Argyll*, 6 Q. B. 477. *Glenester v. Hunter*, 5 C. & P. 65. *Kerridge v. Hesse*, 9 C. & P. 200. *Burls v. Smith*, 5 M. & P. 735.
 (x) *Bailey v. Macauley*, 13 Q. B. 827. *Horsley v. Bell*, Amb. 770; 1 Br. C. C. 101 n. *Maudslay v. Le Blanc*, 2 C. & P. 409, n. *Doubleday v. Muskett*, 4 M. & P. 760.
 (y) *Kelner v. Baxter*, L. R., 2 C. P. 174; 36 L. J., C. P. 94.

acted through the medium of resolutions passed by a managing committee, and through orders given by the secretary, or some accredited officer of the committee, one committeeman would not be responsible for the private and individual orders and contracts of a co-committeeman, or of any of the projectors, or of the secretary, made without the knowledge and sanction of the board, and of which he has known nothing until a claim is made upon him in respect thereof. The act of a secretary not authorized by the board does not bind the board; and, if authorized by it, it binds only those members who were present and concurred in giving authority to the secretary. (*z*) Where a railway company was projected, and a committee of management formed, and the defendant consented to become a member of such committee, and afterwards took the chair at one of its meetings, it was held that he was responsible for the payment of a stationer's bill, for pens, ink, and paper, supplied by the order of the secretary, for the use of the committee, after the defendant had become a member of it. (*a*) A committeeman is not responsible for things ordered by the solicitor of the company, unless it be proved that the solicitor acted under an express authority from the committee. (*b*) If an authority to contract on behalf of the company or a committee is vested in eight persons, those who delegated to them the particular authority are not bound by the acts and contracts of six out of the eight. (*c*) The mere attendance of a party at a meeting called to consider the advisability of a scheme, and not to carry it into effect, and

(*z*) *Burnside v. Dayrell*, 3 Exch. 231.
Rennie v. Wynn, 4 Id. 697.

(*a*) *Barnett v. Lambert*, 15 M. & W.
489.

(*b*) *Cooke v. Tonkin*, 16 L. J., Q. B.
153.

(*c*) *Brown v. Andrew*, 18 L. J., Q.
B. 153.

at which meeting no orders are given for expenses to be incurred, or for anything to be done for the purpose of working out the project, will not render the party responsible upon orders given at subsequent meetings which he has not attended. And, if parties employed by the managing committee or directors are expressly told that they must look to the deposits for remuneration for their services, and that the members of the committee will not hold themselves personally responsible for payment, these last will then be protected from personal liability. (*d*) But, if an advance is made on the personal responsibility of the promoters, the subsequent adoption of their acts by the directors after the company has been formed will not relieve them from liability. (*e*) A member of a managing committee cannot, of course, be made responsible for the price of goods ordered, or work done, or upon contracts entered into, by the committee before he became a member, or held himself out to the world as a member of it, (*f*) nor after he has retired from the management. (*g*) Where the defendant and others, as provisional directors of a projected company, resolved at a meeting that the company should be advertised in several newspapers, and directed their secretary to take the necessary steps for that purpose, and the secretary accordingly applied to an advertising agent, to whom (on his calling at the company's offices to inquire under what authority the secretary was acting), he showed the prospectus and the above resolutions, it was held that there was evidence, that the directors who were parties to the resolutions

(*d*) *Giles v. Smith*, 11 Jur. C. P. 334.
Rennie v. Clark, 5 Exch. 293. *Land-*
man v. Entwistle, 7 Id. 632.

(*e*) *Scott v. Lord Ebury*, L. R., 2
C. P. 255; 36 L. J., C. P. 161.

(*f*) *Beale v. Moulds*, 16 L. J., Q. B.
410. *Newton v. Belcher*, 12 Q. B.
921.

(*g*) *Maitland, ex parte*, 23 L. J., Ch.
148.

were responsible for the debt thereby incurred, notwithstanding they had been induced to allow their names to appear as directors upon the faith of the secretary's assurance that all the preliminary expenses would be provided for by him and that they would incur no liability, there being nothing to show that the secretary, in giving the orders, or in communicating to the plaintiff the resolutions of the directors, had acted beyond the scope of his actual or apparent authority as secretary. (*h*) But, where A consented to his name being inserted in a prospectus as a director of a projected company, and, on the prospectus being sent to him by the secretary of the company, suggested alterations, and also that the company should be advertised in a particular newspaper, it was held that there was no evidence that he authorized the secretary to pledge his credit for all the expenses of advertising the company. (*i*)

141. Powers and responsibilities of provisional committeemen.—An association of persons who have agreed to act together as provisional committeemen is not a co-partnership; and one committeeman is not impliedly the agent of another, for the purpose of carrying the common object into effect. The mere fact, therefore, of a person's having agreed to become a member of a provisional committee of a projected undertaking, will not render him responsible upon the contracts and for the debts and engagements of such committee; and the mere announcement of the fact in printed papers and prospectuses, issued by his authority, will not make him liable. "If not responsible as being one of the committee in fact, he cannot become so

(*h*) *Maddick v. Marshall*, 17 C. B., N. S. 829. *Collingwood v. Berkeley*, 15 C. B., N. S. 145.

664; 34 L. J., Ex. 131. And see *Riley v. Pakington*, 36 L. J., C. P. 204; L. R., 2 C. P. 536.

(*i*) *Burbridge v. Morris*, 3 H. & C.

by the representation of that fact." (*k*) A provisional committeeman, who has not himself received the deposit paid on an allotment of shares, and who has taken no part in the management of the undertaking, is not responsible for the application of the deposits by the managers. (*l*) But, if the general management of the business of the company is vested in a provisional committee of management, every member of such committee who takes an active part in the management will be responsible upon the contracts entered into by such committee. (*m*) If there is both a provisional committee and a managing committee co-existing, the members of the latter are not in general the agents of the former, and their contracts do not bind the members of the provisional committee in the absence of express proof of agency. (*n*) But, if a company starts with a provisional committee of management, consisting of a great number of persons, all of them taking a more or less active part in the management, and then another smaller managing committee is formed, so that there is both a provisional committee and a managing committee co-existing, and the provisional committee has the appointment of, and the control over, the managing committee, the members of the latter may become the agents of the former, authorized to act for them as well as on their own account. (*o*)

142. *Contracts with committees of clubs and eleemosynary institutions.*—The members of the man-

(*k*) *Reynell v. Lewis*, *Wyld v. Hopkins*, 15 M. & W. 517; 16 L. J., Ex 30. *Barker v. Stead*, 3 C. B. 946. *Patrick v. Reynolds*, 1 C. B., N. S. 727.

(*l*) *Burnside v. Hayrell*, 3 Exch 227; 19 L. J., Ex. 46.

(*m*) *Bailey v. Macaulay*, 13 Q. B. 815; 19 L. J., Q. B. 73.

(*n*) *Williams v. Pigott*, 2 Exch 201. *Dawson v. Morrison*, 16 L. J. C. P. 240.

(*o*) *Tanner*, ex parte, 21 L. J., Ch. 214.

aging committee of a club or charity are personally responsible for the payment of tradesmen who have supplied goods, and to servants who have performed work and rendered services, for the benefit of the club or for the advancement of the common objects of the institution, by order of the committee, as the credit is deemed to have been given to the committee, rather than to the subscribers at large, who are a constantly fluctuating body, unknown individually to the persons executing such orders. (*p*) Subscribers who pay an entrance fee on admission to a club, and an annual subscription afterwards, for the purpose of forming a fund for defraying the expenses of the establishment, and who appoint a committee to administer such fund, are not themselves responsible upon the contracts and engagements, or for the debts and liabilities, of such committee, (*q*) unless it can be shown that they individually concurred in, or assented to, the orders given, or authorized the committee to pledge their credit. As the members of the committee, therefore, in these cases, do not bind the subscribers at large by their contracts, or give to the persons whom they have employed a tangible third party to proceed against, they are themselves the only persons who can be sued, and are in fact principals in the transaction. (*r*) If the managing committee of a club, or eleemosynary or literary institution, or any other association of persons, allow the steward or secretary, or any one of the members of the committee, to discharge the functions of the whole body, as, for instance, to order supplies of goods on credit, or to hire workmen and servants for the use of the institution, they make him their general

(*p*) *Cullen v. Duke of Queensbury*, 1 Br. P. C. 404; 1 Br. C. C. 101. (*r*) *Burls v. Smith*, 7 Bing. 705; 5 M. & P. 735. *Glenester v. Hunter*, 3 (*q*) *Fleming v. Hector*, 2 M. & W. C. & P. 65.

agent, and clothe him with an implied authority to pledge their credit for the payment of the things ordered, and of the people employed by him, within the limits of the ordinary course of dealing, unless they have beforehand furnished him with sufficient funds for the purpose, and never permitted him to deal on credit.¹

Where the rules of a coal club were framed so as to make the secretary of the club the agent of all the members for ordering coals, and provided for payment of the coals ordered by an order on the treasurer, signed by the secretary and the chairman of the next meeting held after the delivery of the coals, it was held that the secretary was authorized to pledge the credit of the members, and that they were all responsible for the payment of coals ordered by the secretary. (s)

(s) *Cockerell v. Aucompte*, 2 C. B., N. S. 440; 26 L. J., C. P. 194.

¹ As to the rules as to these and like associations, see *People v. Nelson*, 3 Lans. 321; 10 Abb. (Pr.) N. S. 200; *Babb v. Reed*, 5 Rawle, 151; *White v. Brownell*, 3 Abb. (Pr.) N. 318; *Williams v. Bank of Michigan*, 7 Wend. 542; *Townsend v. Goewey*, 19 Id. 424; *Crow v. Jackson*, 5 Hill, 478; *Wells v. Gates*, 18 Barb. 554; *Dennis v. Kennedy*, 19 Id. 517; *Atkins v. Hunt*, 14 N. H. 205; *Bullard v. Kinney*, 10 Cal. 60; *Commonwealth v. Green*, 4 Whart. (Pa.) 531, 598; *Livingston v. Lynch*, 4 Johns. Ch. 573; *Irvine v. Forbes*, 11 Barb. 587. And see *Allen v. Clark*, 65 Id. 563; *Douglass v. Merceles*, 23 N. J. Eq. 331; *Leech v. Harris*, 2 Brewst. (Pa.) 571; *Morton v. Smith*, 5 Bush. (Ky.) 467; *Pease v. Pease*, 35 Conn. 131; *Sparrow v. Grove*, 31 Md. 214; *Mears v. Moulton*, 30 Id. 142; *Whitman v. Keith*, 18 Ohio St. 134; *Bray v. Farwell*, 3 Lans. 495; *Fox v. Naramore*, 36 Conn. 376; *Rooke v. Russell*, 2 Lans. 244. Even without statutory provisions, the members would be liable as partners. *Kingsland v. Braisted*, 2 Lans. 17. See also *Thomas v. Ellmaker*, 1 Pa. Law Journ. R. 502; *Driscoll v. Lewiston, &c. Society*, 59 Me. 474; *Cook v. Kent*, 105 Mass. 246; *Harmstead v. Washington Fire Co.* 1 (Pa.) Leg. Gaz. R. 392; *Bacon v. Dinsmore*, 42 How. (N. Y.) Br. 368; *McMahon v. Rauhr*, 47 N. Y. 67. *Norton v. Peck*, 3 Wis 714.

But members of a club are not responsible upon bills of exchange, or for the repayment of money lent, unless they have expressly sanctioned the drawing or acceptance of bills, or the borrowing of money; (t) nor are they responsible upon contracts made by their secretary or one of their members out of the ordinary course of business, without their knowledge. If goods have been furnished by the orders of one only of the members of the committee of management, it is a question for the jury to determine whether the goods were furnished upon the personal and individual credit of the party actually ordering them, or with the authority and on the credit of the whole body of persons managing the institution. (u)¹

143. *Contracts with trustees and commissioners of public works.*—Commissioners and trustees acting in the execution of statutory powers are generally exempted from all personal liability whilst acting within the scope of the statute they are authorized to execute, but are liable to be sued in the name of their clerk or treasurer for the time being; and the public funds in their hands, derived from rates they are authorized to impose, are subjected to the payment and satisfaction of claims proved against them. (x)²

(t) *Earl Mountcashel v. Barber*, 14 C. B. 53; 33 L. J., C. P. 43. within the scope of the Act to be executed by them, the procedure for the

(u) *Todd v. Emly*, 7 M. & W. 427; breach of such contract must be
8 *Id.* 505. *Ante*, pp. 212–218. against the clerk, and the amount re-

(x) If a contract made by them is covered must be paid out of the

¹ See *Dillon on Municipal Corporations*, chap. xv. and pp. 47, 437 (n.), 443, 446 (n.); *Koehler v. Brown*, 2 Daly, 78. Trustees of an association are not individually liable for its debts, unless they have, in some way, specially rendered themselves liable. *Wolf v. Schleiffer*, 2 Brewst. (Pa.) 563; and see *Frendall v. Taylor*, 23 Wis. 538; *McGreary v. Chandler*, 58 Me. 536; *Boyd v. Merrill*, 52 Ill. 151; and see *N. Y. Statute of 1849*, Laws 1849, 389, ch. 258, as extended by *Laws of 1851*, 438, ch. 455. *Kingsland v. Braisted*, 2 Lans. 17.

But although trustees and commissioners of public works have a public fund at their disposal, or may be authorized to impose tolls or make rates and assessments, and so collect money for their purposes, they may nevertheless pledge their own personal credit for the fulfillment of the contract they enter into. If they have borrowed money not in conformity with their borrowing powers, or have exceeded their borrowing powers, and have failed consequently to charge the fund at their disposal with the repayment of the loan, and have given the lender no remedy against the rates, tolls, or assessments they are authorized to levy, they may become personally liable, either on the ground that the money was borrowed on their own personal credit, and not on the credit of the fund, (*y*)¹ or that they falsely represented to the borrower that

public moneys in the hands or under the control of the commissioners. *Hall v. Taylor*, 1 Ell. Bl. & Ell. 113. If judgment is recovered against the officer authorized to be sued, and the commissioners neglect to satisfy the judgment, they may be compelled by mandamus to make a rate and apply it in satisfaction and discharge of the judgment debt. *Reg. v. Rotherham, &c.*, 27 L. J., Q. B. 156. *Ward v. Lowndes*, 29 L. J., Q. B. 40. Where a debt is due, the creditor is entitled to judgment, although there may be no funds for the payment of it, and the creditor may consequently never be able to enforce his judgment by execution. *Bush v. Martin*, 2 H. & C. 311; 33 L. J., Ex. 17. Where, by the Lunatic Asylums Act (8 & 9 Vict. c. 126), a select number of justices, called "the committee of visitors," were empowered to contract for plans for the erection of a lunatic asylum, and were enabled to sue and be sued

in the name of their clerk, and provisions were made for raising funds by subscriptions and by rates, and resolutions were passed at meetings of the committee offering premiums for plans, specifications, and drawings, and appointing an architect, it was held that the committee might be sued in the name of their clerk upon the contracts authorized by these resolutions (*Kendall v. King*, 17 C. B. 483; 25 L. J., C. P. 132. *Cane v. Chapman*, 5 Ad. & E. 652), but that the members of the committee could not be made personally liable upon such contracts (*Allen v. Waldegrave*, 8 Taunt. 566; 2 Moore, 621), nor could execution upon a judgment recovered against the clerk be issued against him. *Wormwell v. Hailstone*, 4 M. & P. 512; 6 Bing. 668. But see *Cobbett v. Wheeler*, 7 Jur. N. S. 260.

(*y*) *Parrott v. Eyre*, 3 M. & Sc. 857; 10 Bing. 283.

¹ *Rockweller v. Elkhorn Bank*, 13 Wis. 653.

they had funds at their disposal for the repayment of the loan, (2) or that they undertook to provide funds for the purpose. They may also contract for supplies of goods, and for work and services, and may hire laborers, under circumstances giving rise to an irresistible presumption that the goods were furnished, and the work was done, on the personal credit of those who gave the order or made the contract, and that the vendor or the workman looked to them for payment, and not to the funds they were authorized to collect. (a)

144. *Salaries of public officers.*—Public officers appointed by trustees and commissioners of public works, under the authority of acts of parliament, providing that their salaries shall be paid out of the rates to be raised under the authority of the act, cannot render the persons who make the appointment personally responsible for the payment of the salary, unless they have expressly contracted to pay it. (b) The only claim of such officers is against the rates; and, these failing, they must go unpaid. (c) When commissioners of public works, authorized by statute to appoint an officer, are directed to pay him a salary, they impliedly contract, on making the appointment, to pay the salary out of the funds they are directed to administer, so as to give the officer who has accepted the appointment a right to sue them in the name of their clerk or treasurer, (d) and proceed to obtain payment out of the appointed fund; but the commissioners do not incur any personal liability by virtue of

(a) *Higgins v. Livingstone*, 4 Dow. 355. *Eaton v. Bell*, 5 B. & Ald. 41.

(a) *Horsley v. Bell*, Amb. 770; 1 Bro. C. C. 101, n. *Lambert v. Knott*, 6 D. & R. 122.

(b) *Bogg v. Pearse*, 10 C. B. 534; 20 L. J., C. P. 99. *Alexander v. Warman*, 6 H. & N. 100.

(c) *Andrews v. Dally*, 4 Bing. 566; 1 M. & P. 490. *Smart v. Guard*, West Ham. Un., 10 Exch. 875. *Addison v. Mayor of Preston*, 12 C. B. 108.

(d) *Hall v. Taylor*, 1 Ell. Bl. & Ell. 113.

the appointment, unless they have entered into an express contract to pay the salary. Whenever a public body is invested with a discretionary power respecting the amount of remuneration to be paid for a particular service, and no express contract has been entered into by the board to pay any particular sum, the court cannot interfere with the exercise of their discretion.¹

145. *Contracts with local boards of health.*—The public health act, 11 & 12 Vict., c. 63, empowers (s. 85) local boards of health to enter into such contracts as are necessary for carrying the act into execution, and provides that the contract, when exceeding £10 in value or amount, shall be in writing, and (in the case of a corporate district) (e) sealed with the common seal of the board, and shall specify the work, materials, matter, or things to be furnished, the price to be paid, and the time within which the contract is to be performed. By s. 140, no contract entered into by the local board shall, if the contract were entered into bona fide for the purpose of executing the act, subject the members, or any of them, personally, to any action, liability, claim, or demand whatsoever;

(e) By the 29 & 30 Vict. c. 90, s. 46, all local boards are incorporated.

¹ And see in the United States, *Ware v. United States*, 7 Ct. of Cl. 565; *Moren v. Blue*, 47 Ala. 709; *Reynolds v. Blue*, Id. 711; *Wallace v. Marion County*, 37 Ind. 383; *Geisel v. Taylor*, Id. 390; *Hyland v. Waterworks Co.* Id. 523; *People v. Miller*, 24 Mich. 458; *Settle v. Van Eura*, 39 N. Y. 280; *Clapp v. United States*, 7 Ct. of Cl. 351; *United States v. Wendell*, 2 Cliff. 340; *Reynolds v. Taylor*, 43 Ala. 420; *Carroll v. Siebenthaler*, 37 Cal. 193; *Tenney v. State*, 27 Wis. 387; *Mayfield v. Moore*, 53 Ill. 428; *Wayne County v. Benoit*, 20 Mich. 170. As to extra pay, see *Twenty per cent. cases*; 13 Wall. 568; *United States v. Smith*, 1 Boud. 68; *Jay County v. Templer*, 34 Ind. 322; *Chatfield v. Washington County*, 3 Oreg. 318; *Goldsborough v. United States*, Taney, 80; *United States v. White*, Id. 152; *Carlyle v. Sharp*, 51 Ill. 71.

and any expense incurred by the local board is to be borne and repaid out of general district rates. There is nothing in these sections to prevent the board from being liable, in its corporate capacity, upon the contracts it has entered into. They show, merely, that the expense incurred by the corporation is to be repaid by a rate, and that the members of the board are not to be individually liable.¹

Many of the requirements contained in these sections of the statute are directory only; and a strict compliance with them is not to be treated as a condition precedent to the liability of the board upon the contracts they have entered into; for the parties with whom they contract have no means of ascertaining whether every minute requirement of the statute has been complied with by the board prior to the making of the contract. (*f*) But that portion of the section which requires the contract to be in writing, and sealed with the common seal, must be strictly complied with in order to render the contract binding upon the rates. (*g*) Where the members of a local board of health resolved to oppose a gas bill promoted by a public company, and employed parties to make experiments and to give evidence before a committee of the house of commons, it was held that the members of the board, who had acted in their corporate capacity, could not be made personally liable to the parties they had employed. (*h*) Where a local board entered into a contract for certain work to be done to a street, "the contractor to be paid for the work when,

(*f*) *Nowell v. Mayor, &c. of Worcester*, 9 Exch. 467. *Cunningham v. Local Board of Wolverhampton*, 7 Ell. & Bl. 113.

(*g*) *Frend v. Dennett*, 4 C. B., N. S. 583; 27 L. J., C. P. 314.

(*h*) *Bailey v. Cuckson*, 32 Law T. R. 124; 7 W. R., Q. B. 16.

¹ See Dillon on Municipal Corporations, 305 (n.).

and as the money is collected, from the owners of the property adjacent," and the board was unable to collect the necessary funds from the owners, by reason of the notices served upon them proving informal, it was held that there was an implied undertaking, on the part of the board, to do all things necessary to enable them to fulfill the contract, and that their inability, by reason of the defective notice, to collect the necessary funds, was no answer to an action by the contractor to recover the cost of the works. (*i*)

146. *Contracts with parish officers.*—Agreements entered into by churchwardens and parishioners will, under certain circumstances, be binding upon the parish. Thus, where the plaintiff's house was so near the church that the five o'clock bell rung in the morning disturbed her, and it was agreed between her and the churchwardens and parishioners, in vestry assembled, that a cupola and clock should be erected by her on the church, and that, in consideration of this being done, the five o'clock bell should not be again rung during her life, and the cupola and clock were accordingly erected, and the bell was silenced for two years, after which time it was rung again, the court of chancery held that the agreement was binding upon the parish, and granted an injunction against the ringing of the bell. (*k*) But, as churchwardens, overseers of the poor, and parish officers, have no power of contracting so as to give any right of action against the parish, they are themselves personally responsible upon all contracts entered into by them in the exercise of the duties of their office, (*l*) unless the party they have contracted with agrees to look exclusively to the

(*i*) *Worthington v. Sudlow*, 34 L. J., Q. B. 131.

(*l*) *Kirby v. Bannister*, 5 B. & Ad. 1069. *Crew v. Petit*, 3 N. & M.

(*k*) *Martin v. Nutkin*, 2 P. Wms. 266. 456.

funds of the parish for payment. (*m*) Where the plaintiff, a baker, supplied bread to the workhouse, for the use of the poor, and all the churchwardens and overseers had, at one time or another, concurred in and assented to the orders given for the bread, it was held that they were all equally responsible to the plaintiff for the payment of the price of it. (*n*)

Where several parishioners, attending at a vestry, signed resolutions authorizing the churchwardens to cause the tower of the parish church to be repaired, and the repairs were done, and a rate was made for defraying the expenses, but this rate was quashed, and one of the churchwardens was sued by the workman, and compelled to pay the whole cost of the repairs, and then brought his action against the other churchwarden who had concurred in the orders, for contribution, it was held that he was entitled to recover from him a moiety of the amount he had been compelled to pay. (*o*) But there is no authority from one parish officer to bind another, resulting from the mere tenure of office. One churchwarden, for example, has no authority as such to pledge the credit of his co-churchwardens for repairs to the parish church; and if he gives orders without their knowledge and concurrence, he cannot involve them in the liability incurred in respect of the execution of such orders. (*p*) A mere honorary churchwarden, who takes no active part in the management of the parish affairs, but devolves all the duties of the office upon a paid colleague, cannot be made responsible for the acts and orders of the latter. And an overseer who

(*m*) *Marsh v. Davies*, 17 L. J., Ex.
94. *Ante*, pp. 210, 216-217.

(*n*) *Lambert v. Knott*, 6 D. & R.
122.

(*o*) *Lanchester v. Tricker*, 8 Moore
20.

(*p*) *Northwaite v. Bennett*, 2 Cr. &
M. 316.

directs money or goods to be supplied by a third party to certain poor people, cannot make his co-overseers responsible for the payment of the goods, unless they have expressly or impliedly concurred in such orders or directions, either by being present when they were given, or by being in the habit of attending meetings of the overseers and relieving officers, at which orders and directions of that description were in the habit of being given, as previously mentioned. Whether the ordering of goods or the hire of servants by one parish officer for the use of the parish creates a contract binding upon his colleagues is a question of fact depending upon the particular circumstances of each case. (g) If a debt is incurred by overseers for legal proceedings in respect of parish business, their personal liability in respect thereof is not transferred, by the 11 & 12 Vict. c. 91, to their successors in office. (r)

Overseers of the poor are bound to take care of casual poor within their parishes; and the law obliges them to reimburse a private individual for expenses necessarily incurred by him in procuring relief and medical attendance for a casual pauper on any sudden emergency. (s) If an accident happens in the parish of A to a pauper belonging the parish of B, which disables the pauper, and he is then removed to his own place of abode in his own parish of B, and attended by the surgeon of that parish, the surgeon may maintain an action against the officers of the parish of A, where the accident happened, to recover a reasonable compensation for his medicine and attendance. (t) But

(g) *Eaden v. Titchmarsh*, 1 Ad. & E. 691; 3 N. & M. 712. *Massey v. Knowles*, 3 Stark. 65. *Malkin v. Vick-erstaff*, 3 B. & Ald. 89.

(r) *Chambers v. Jones*, 19 L. J., Ex. 235.

(s) *Simmons v. Wilmot*, 3 Esp. 91.

(t) *Tomlinson v. Bentall*, 5 B. & C. 745; 8 D. & R. 493. *Lamb v. Bunca*, 4 M. & S. 275.

the law raises no implied promise from one parish to another in respect of relief and necessities afforded to casual poor, (*u*) unless the parish sued has, in some shape or another, sanctioned or authorized the relief. (*x*) An agreement by the churchwardens, overseers, and surveyors of a parish for a lease of land to be converted into gardens for the occupation of the poor is a personal contract of their own upon which they are individually liable; and they may, consequently, be sued for the rent agreed to be paid to the owner, or for use and occupation, although they have ceased to be parish officers. (*y*)

By the 30 & 31 Vict. c. 106, s. 13, guardians may, with the approval of the poor-law board, hire, or take on lease, temporarily, or for a term of years not exceeding five, any land or buildings for the purpose of the relief or employment of the poor, and the use of the guardians or their officers, without any order of the board under seal.

The right of action in respect of parish lands and hereditaments is regulated by act of parliament, and is vested either in the churchwardens and overseers of the poor of the parish for the time being, who are empowered to take and hold parish lands in the nature of a body corporate, (*z*) or in the guardians of parishes and unions under the 5 & 6 Vict. c. 57, s. 16, whereby it is enacted that it shall be lawful for every board of guardians constituted under the 4 & 5 Will. 4, c. 76, "to accept, take, and hold, on behalf of the union or parish respectively for which they may act, any lands, buildings, goods, effects, or other property,

(*u*) *Atkins v. Banwell*, 2 East, 505.

(*x*) *Paynter v. Williams* 1 Cr. & M. 815.

(*y*) *Uthwatt v. Elkins*, 13 M. & W. 772, 777. 5 & 6 Vict. c. 57.

(*z*) 59 Geo. 3, c. 12, s. 17. *Doe v. Harpur*, 2 D. & R. 708.

as a corporation; and in all cases to sue and be sued in their corporate name." The 59 Geo. 3, c. 12, s. 17, vests in the churchwardens and overseers of the parish all buildings, lands, and hereditaments belonging to such parish, not merely where the profits thereof are applicable to the relief of the poor, but where they are applicable to those purposes for which church rates are levied. (a) If lands and tenements have been originally conveyed to trustees upon trust to apply the rents and profits thereof for the benefit of the poor, or towards the repair of the parish church, and the trustees die, and there are no known trustees in existence, the legal estate vests in the churchwardens, and they are the proper parties to bring an action for the rent and for the use and occupation of the property; but, when there are known trustees in existence, their estate is not divested by the statute and transferred to the churchwardens and overseers, and the latter cannot consequently sue in respect of such lands. (b) The right of action upon certain bonds and securities given to churchwardens and overseers of the poor under the 59 Geo. 3, c. 12, s. 7, continues vested in the churchwardens and overseers for the time being, notwithstanding the 7 & 8 Vict. c. 101, s. 61. (c) Vestrymen who attend parish meetings, and concur in and sign resolutions for the repairs of the church, or the parish roads, for the purpose of setting the churchwardens and surveyors in motion, and authorizing them to act on behalf of the parish, do not incur any individual liability in respect of the carrying out of such resolutions, and of the orders given by the parish officers founded thereon. They have not, like church-

(a) *Alderman v. Neate*, 4 M. & W. 704. *Stark*, 9 Ad. & E. 255. *Ward v. Clarke*, 12 M. & W. 717.

(b) *Churchwardens of Deptford v. Sketchley*, 8 Q. B. 394. *Allason v. Skelton v. Ruskby*, 4 Exch. 545.

wardens, the power of making a rate to provide a fund for defraying expenses; and it is notorious that they attend merely for the purpose of authorizing certain things to be done which are to be paid for by a rate upon the parish; and their own individual credit and responsibility are not considered to be in anywise pledged for the payment of the expenses incurred in carrying the vestry resolutions into effect. (*d*) But vestrymen, in vestry assembled, may, like any other persons, exceed their duties as vestrymen, and give their own personal undertaking in respect of the affairs of the parish. Thus, where twenty-four persons, in vestry assembled, signed a guarantee, which was entered in the vestry minute-book, to the following effect:—"At a vestry meeting, held, &c., it was moved and seconded by, &c., that this meeting do highly approve of the proceedings taken by the present surveyor, &c., and do hereby guarantee to him all legal expenses that are or may be hereafter incurred by him, in prosecuting the said suit;" it was held, by Lord Tenterden, that all the vestrymen who had signed the guarantee, so entered in the vestry minute-book, had rendered themselves personally responsible for the fulfillment of their engagement. (*e*)

Surveyors of turnpike roads, being the mere servants or agents of the commissioners, are not themselves, in general, responsible for the payment of the contractors and laborers employed upon the road. (*f*)

147. *Friendly societies.*—Contracts with friendly societies are regulated by the 18 & 19 Vict., c. 63, the 21 & 22 Vict., c. 101, and the 23 & 26 Vict., c. 58.

(*d*) *Lancaster v. Tricker*, 8 Moore, 20; 1 Bing. 201. *Lancaster v. Frewer*, 9 Moore, 688; 2 Bing. 361. *Sprott v. Powell*, 11 Moore, 398; 3 Bing. 478.

(*e*) *Heudebowick v. Langton*, 3 C. & P. 571.

(*f*) *Pochin v. Pawley*, 1 W. Bl. 670.

148. *Loans to friendly societies.*—Where money has been lent to the directors and recognized officers or agents of a friendly society, and the money has come to the use of the society, and the members have had the benefit of the loan, the society cannot exempt itself from responsibility by showing that the directors have exceeded their borrowing powers, or that certain prescribed formalities annexed to those borrowing powers have not been complied with. (*g*)¹

149. *Industrial and provident societies.*—Contracts with industrial and provident societies are regulated by the 25 & 26 Vict., c. 87, the 30 & 31 Vict., c. 117, and the 34 & 35 Vict., c. 80. An industrial and provident society, registered under these acts, is not liable to be sued, in its corporate capacity, for goods supplied before the registration, although the action is not brought until after registration. (*h*) Such an action should be brought against the committee of management. (*i*) But a society formed under the 15 & 16 Vict., c. 31, and afterwards registered under the acts now in force, may sue, in its corporate name upon a bond given to the trustees of the society, before the passing of the latter acts. (*k*) Members of an unregistered society, enrolled and certified under the industrial and provident societies act (15 & 16 Vict., c. 31), giving a promissory note, in the following form, for a debt of the society:—"Twelve months after date,

(*g*) *Pare v. Clegg*, 30 L. J., Ch. 747.
29 Beav. 589.

(*h*) *Linton v. Blakeney Joint Co-operative Industrial School*, 3 H. & C. 853; 34 L. J., Ex. 211.

(*i*) *Dear v. Mellard*, 32 L. J., C. P. 252; 15 C. B. N. S. 19. *Toutill v. Douglas*, 33 L. J., Q. B. 66.

(*k*) *Queensbury Industrial Soc. v. Pickles*, 3 H. & C. 857; 35 L. J., Ex. 1; L. R. 1 Ex. 1.

¹ See *Sullivan v. Campbell*, 2 Hall. (N. Y.) 271; *Henry v. Jackson* 37 Vt. 431; *Waite v. Merrill*, 4 Me. (4 Greenl.) 102; *Anderson v. Brock*, 3 Id. (3 Id.) 102.

we, the undersigned, being members of the executive committee, on behalf of the L. and S. W. Railway Co-operative Society, do jointly promise to pay," &c., are personally liable. (l)

150. *Contracts with benefit building societies* are regulated by the 6 & 7 Wm. 4, c. 32, and the 33 & 34 Vict., c. 97, s. 112. Parties who sign promissory notes, or expressly contract in their own names for the repayment of money advanced to a benefit building society, cannot exonerate themselves from personal liability upon their contract, merely by describing themselves on the face of it as "trustees" or "secretary" for the society. (m)¹

151. *Contracts with freehold land societies.*—There is a great distinction between a freehold land society and a benefit building society. A freehold land society buys land with the funds contributed by the members of the society, and then divides it amongst them; but a benefit building society advances to its borrowing members money derived from the subscriptions, which the borrowing members themselves lay out in the purchase of lands or buildings, and then mortgage them to the society. A freehold land society, whose rules authorize the directors to make speculative investments of the funds of the society, in the purchase of estates to be partitioned and divided amongst the members, cannot be registered as a benefit building society, as its objects are totally different from those of a benefit building society; and both the directors or

(l) *Gray v. Raper*, L. R., 1 C. P. 694. 29 L. J., Ex. 331. *Mare v. Charles*, 5 (m) *Price v. Taylor*, 5 H. & N. 542; Ell. & Bl. 981.

¹ As to benefit societies in the United States, see, generally, *St. Mary's, &c. Society v. Burford*, 70 Pa. St. 321. As to building societies: *Oak Cottage, &c. Association v. Eastman*, 31 Md. 556; *Davis v. West, &c. Union*, 32 Md. 285.

trustees who enter into contracts for the purchase of estates, and the members or shareholders who authorize them to be made, may become personally responsible for the fulfillment of such contracts. (*n*)

152. *Salaries of officers of friendly societies.*—Surveyors, secretaries, solicitors, and officers of benefit building societies and industrial and provident societies generally, have notice by the rules of the society that the remuneration for their services to the society is to be paid out of the funds of the society, so that, if the society becomes insolvent, they have no right to resort for payment to individual members. Officers of this class generally have a much greater interest in the societies to which they are attached than the trustees or directors. In the great majority of cases, they are the persons who get the society up, and at whose request the directors consent to accept office and take upon themselves the liabilities and duties of their situation; and such officers generally discharge their duties, and perform the services rendered by them to the society, with the understanding, on all hands, that they are to be remunerated out of the funds of the society; and if the funds fail, these officers must remain unpaid. (*o*)

Contracts with loan societies are regulated by the 3 & 4 Vict. c. 110, which is made perpetual by the 26 & 27 Vict. c. 56.

Contracts with registered trades unions are regulated by the 34 & 35 Vict. c. 31.

153. *Contracts with infants.*—All individuals below the age of twenty-one years are clothed only with a qualified power of contracting; *i.e.*, their contracts will bind them, provided they were necessary

(*n*) *Grimes v. Harrison*, 26 Beav. 435; 23 L. J., Ch. 823.

(*o*) *Alexander v. Worman*, 6 H. & N. 100; 30 L. J., Ex. 198.

and for their benefit and advantage; but, if they were unnecessary and unfit and improper contracts for them to have entered into, they will be entitled to recede from them and vacate them.¹ "By the infants' relief act, 1874 (37 & 38 Vict., c. 62), s. 1, it is enacted that all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void; provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable." All penal obligations entered into by infants are absolutely void, as it is not necessary for them, nor can it be for their benefit and advantage, to subject themselves to a penalty. (*p*) All deeds, also, and covenants, feoffments, grants, releases, confirmations, cognovits, or other writings under seal made by infants, are, as a general rule (subject to some few exceptions presently noticed), void, (*q*)² and an infant cannot be sued on his covenant to serve contained in an indenture of apprenticeship executed by him; (*r*) nor on a bill of exchange accepted by him, although

(*p*) Co. Litt. 172, a. *Fisher v. Mowbray*, 8 East, 330. *Baylis v. Dineley*, 3 M. & S. 477. *Stikeman v. Dawson*, 16 L. J., Ch. 205.

(*q*) Co. Litt. 171, b. *Oliver v. Woodroffe*, 4 M. & W. 650.

(*r*) *Gylbert v. Fletcher*, Cro. Car. 179.

¹ Every person deals with an infant at arm's length, at his own risk, and with a party over whom the law has a jealous watchfulness. Story on Cont. § 108.

² *Barker v. Wilson*, 4 Heisk. (Tenn.) 268; *Johnston v. Furnier*, 69 Pa. St. 449; *Higginbotham v. Thomas*, 9 Kan. 328; *Monumental, &c. Association v. Herman*, 33 Md. 128; *Walsh v. Powers*, 43 N. Y. 23; *Irvine v. Irvine*, 9 Wall. 617; *Flynn v. Powers*, 54 Barb. 550; 36 How. Pr. 289.

the bill may have been accepted on account of necessities furnished to such infant; (*s*) nor on a contract of suretyship; (*t*) nor for a breach of warranty made by him on the sale of a horse; (*u*) nor is he bound by an agreement to refer disputes to arbitration, nor by the recitals in any deed executed by him during infancy. (*v*) If the infant has induced another party to contract with him by falsely representing that he was of age, he is not, nevertheless, precluded from setting up his infancy as an answer to any action founded on such contract. (*x*)

All contracts by infants for the borrowing of money to be expended in the purchase of the necessities of life, are null and void; for the infant may misapply the money, and the law will not trust him. (*y*) But, if money is laid out by another person in the purchase of necessities for an infant, such money may be recovered from the latter. (*z*) The law will raise no implied promise from an infant in respect of an account stated, as the law presumes that he has not sufficient capacity for business to state and settle an account, so as to be bound thereby. (*a*)¹ Contracts

(*s*) *Williamson v. Watt*, 1 Campb. 31 L. J., Q. B. 57. *De Roo v. Foster*, 551. *Harrison v. Cotgreave*, 16 L. J., 12 C. B., N. S. 272. C. P. 198.

(*t*) *Maples v. Wightman*, 4 Conn. Mod. 67. *Darby v. Boucher*, 1 Salk. 376. *Allen v. Minor*, 2 Call. 70. 279. *Probart v. Knouth*, 2 Esp. 472.

(*u*) *Howlett v. Haswell*, 4 Campb. n. *Smith v. Gibson*, 2 Peake, 52.

118. *Green v. Greenbank*, 2 Marsh. (*s*) *Ellis v. Ellis*, 12 Mod. 197; 1

485. *Grove v. Nevil*, 1 Keb. 778. Raym. 344. *Marlow v. Pitfield*, 1 P.

(*v*) *Watson's Arbitr.* 40, 1, 2. Milms. 558. *Clarke v. Leslie*, 5 Esp.

ner v. Lord Harewood, 18 Ves. 28. *Hedgley v. Holt*, 4 C. & P. 104.

274. (*a*) *Trueman v. Hurst*, 1 T. R. 42.

(*x*) *Bartlett v. Wells*, 1 B. & S. 836; *Oliver v. Woodroffe*, 4 M. & W. 650.

¹ But an agreement made by an infant, by which he agrees to repay money which he has received, will become binding upon him, if he fail to disaffirm it within a reasonable time after majority. *Slucker v. Zoder*, 33 Iowa, 177; *Chapin v. Shafer*, 47 N. Y. 107.

also entered into by infants in the exercise of a trade may be avoided by them; for the law does not consider it to be necessary or beneficial for infants to embark in trade and hazard their fortunes in commercial speculations.¹ An action, consequently, cannot be maintained against an infant who carries on trade, for work done for him, or goods or merchandise sold, or for the rent of houses and buildings hired by him, in the course of that trade, although he gains his living thereby; (b)² nor upon a bill of exchange, drawn, accepted, or indorsed by such infant in carrying on trade. (c)³ An agreement with an infant workman which binds him to serve during a certain term, but leaves the master free to stop his work and his wages

(b) *Dilk v. Keighley*, 2 Esp. 480. *Hodg.* 30. *Mason v. Wright*, 13 Met. Whittingham v. Hill, Cro. Jac. 494. 306.
 Whywall v. Champion, 2 Str. 1083. (c) *Williams v. Harrison*, Carth. 160.
Lowe v. Griffith, 1 Sc. 458; 1 *Williamson v. Watts*, 1 Campb. 551.

¹ *Kinnen v. Maxwell*, 66 N. C. 45; and see, under the Iowa statute, *Bellar v. Marchant*, 30 Iowa, 350.

² Or for a mortgage made by him in carrying on such trade (*Kinnen v. Maxwell*, 66 N. C. 75; and see *Robinson v. Weeks*, 56 Me. 102). Or as a partner (*Vinsen v. Lockard*, 7 Bush (Ky.), 458). As to notes and bills, see *Garner v. Cook*, 30 Ind. 331.

³ *Ray v. Haines*, 52 Ill. 485; *Derocher v. Continental Mills*, 58 Me. 217; *Meredith v. Crawford*, 34 Ind. 399. Bounty money to a minor is a gift and not wages, and his agreements thereon are voidable (*Holt v. Holt*, 59 Me. 465). "An infant may avoid his special agreement, even though it be an entire contract, when partially executed, and recover reasonable compensation for services actually performed, as if no such special agreement had been made" (*Story on Cont.* § 105; *Moses v. Stevens*, 2 Pick. 332; *Vent v. Osgood*, 19 Id. 572; *Bishop v. Shepherd*, 23 Id. 492; *Judkins v. Walker*, 17 Me. 38. See, however, *Whitemarsh v. Hall*, 3 Den. 375; *McCoy v. Huffman*, 8 Cow. 84). But if the other party suffer injury from the infant's failure to perform the contract, it may go to reduce his compensation. *Story on Cont.* § 105; *Moses v. Stevens*, 2 Pick. 332; *Thomas v. Dike*, 11 Vt. 273.

whenever he chooses, is not beneficial to the infant and is consequently wholly void. (d)¹ A plaintiff cannot convert a breach of duty arising out of a contract into a tort so as to charge an infant in an action *ex delicto*.² Therefore, if a horse lent to an infant is immoderately ridden by the latter and is injured, the infant is protected from liability by his infancy. (e)³ But, if the act of the infant is not an abuse of a contract, but a wrong actionable per se, he will not be protected from the consequences. (f)⁴

154. *Rights ex contractu of infants*.—"Infancy is a personal privilege, of which no one can take advantage but the infant himself; and, therefore, though the contract of the infant be voidable, yet it shall bind the person of full age." (g) Therefore, in cases of promises of marriage, contracts of purchase and sale, and contracts for the performance of work, the adult con-

(d) Reg. v. Lord, 12 Q. B. 765.

(f) Burnard v. Haggis, 14 C. B., N

(e) Jennings v. Rundall, 8 T. R.

S. 45; 32 L. J., C. P. 189.

335. Green v. Greenbank, 2 Marsh.

(g) Bac. Abr. INFANTS (T.) 4.

485.

Farnham v. Atkins, 1 Sid. 446. Holt v. Ward, 2 Str. 937; 2 Barn. 173.

¹ And see Juan v. Coffin, 58 Me. 254; Burnham v. Seaverns, 101 Mass. 360.

² An infant bailee of a horse is liable for positive, tortious, willful acts causing injury or death of the horse. But in an action on the case therefor the declaration must show whether the tort amounts to a disaffirmance of the contract of bailment. Mere unskillful driving will not sustain the action. Eaton v. Hill, 50 N. H. 235.

³ Id. And see Homer v. Kewing, 3 Pick. 492; Peigne v. Sutcliffe, 4 McCord, 387; Green v. Sperry, 16 Vt. 390; Brown v. Maxwell, 4 Hill, 592; School Dist. v. Bragdon, 3 Foster, 511; Towne v. Wiley, 23 Vt. 355; Baxter v. Bush, 29 Id. 465.

⁴ Story on Cont. § 100; Oliver v. Houdlet, 13 Mass. 240; Whitney v. Dutch, 14 Mass. 463; Dinsmore v. Webber, 59 Me. 103; Putnam v. Hill, 38 Vt. 85.

tracting party is bound and may be sued by the infant, although the latter has incurred no corresponding legal obligation. (*h*) But an infant cannot obtain a decree for a specific performance of a contract against an adult contracting party. An infant cannot be compelled to complete a contract for the purchase of an estate; but, if he has paid a deposit under such a contract, he cannot recover it back merely because he declines to complete the purchase. (*i*) When an infant has brought an action by his next friend and has recovered damages which have been received by the attorney, the money is the money of the infant; and he may sue the attorney for it. (*k*)¹

155. *Contracts binding upon infants.*—Infants are not rendered absolutely incapable of contracting so as to bind themselves; for “the law, at the same time that it protects their imbecility and indiscretion from injury, enables them to do certain binding acts for their own benefit. They may grant leases when it is manifestly to their interest and advantage that leases should be granted; and they will not be permitted to avoid them when they come of age; for the privilege is given as a shield, not as a sword, and shall never be turned into an offensive weapon of fraud and injustice.” (*l*) Therefore, if an infant contracts for necessary repairs to be done to his dwelling-house, he will not be allowed to avail himself of his infancy, as an answer to a fair claim for the payment of the price of

(*h*) *Warwick v. Bruce*, 2 M & S. 205; 6 Taunt. 118. *Forrester's case*, 1 Sid. 41; 1 Keb. 1. *Davies v. Man- ington*, 2 Sid. 109.

(*i*) *Wilson v. Kears*, Peake's Ad. Cas. 196.

(*k*) *Collins v. Brook*, 4 H. & N. 276, 28 L. J., Ex. 143.

(*l*) *Zouch v. Parsons*, 3 Burr. 1801. *Maddon v. White*, 2 T. R. 161.

¹ *Baltimore, &c. R. R. Co. v. Fitzpatrick*, 36 Md. 619.

the work so done. (*m*) By the custom of gavelkind, an infant, at the age of fifteen, is reckoned at full age to sell his lands, but under great limitations and restrictions, to prevent him being defrauded. And by custom, in some places, an infant seized of lands in socage may, at the age of fifteen years, make a lease for years which shall bind him after he comes of age; for the custom makes fifteen his full age to that purpose. (*n*)

156. *Contracts by infants for necessaries.*—"If an infant lives with his parent, who provides such apparel as appears to the parent to be proper, so that the child is not left destitute of clothes or other real necessities of life, the child cannot bind himself to a stranger even for what might otherwise be allowed as necessities." (*o*) If he orders clothes of a tailor, and they are sent to the father's residence, and the latter disapproves of the proceeding, and sends the clothes back, the tailor will have no claim against anybody for the payment of the price of them. He cannot sue the parent, because he has not sanctioned or authorized the contract; (*p*) neither can he sue the infant; for, as the latter was provided for in the father's house, he was under no necessity of contracting for the purchase of goods on his own credit. If, however, the parent was aware of the order and of the delivery of the goods, and saw the infant using and wearing the articles, and made no objection thereto, and did not exercise his parental authority and control to prevent further supplies of such articles, this will be strong

(*m*) *Smith v. Low*, 1 Atk. 498. *Ashfield v. Ashfield*, Wm. Jones, 157.

(*n*) *Bac. Abr. INF. A.*; *Cr. Litt.* 45 b.

(*o*) *Bainbridge v. Pickering*, 2 W. Bl. 1325. *Cook v. Deaton*, 3 C. & P. 114. *Story v. Perry*, 4 Id. 526.

(*p*) *Blackburn v. Mackey*, 1 C. & P. 1. *Fluck v. Tollemache*, Id. 5. *Crantz v. Gill*, 2 Esp. 472. *Rolf v. Abbott*, 6 C. & P. 286. *Clements v. Williams*, 8 Id. 58.

evidence to show that the father authorized the order to be given, so as to render him responsible as the principal in the transaction, and the real purchaser of the articles, through the medium of his child acting as his agent in that behalf. (*q*) If an infant is placed at a boarding-school by a parent or guardian, the master has not, in general, any remedy against the infant, but must resort to those with whom he agreed for the infant's board and instruction. (*r*)¹

157. *Infants not residing under the parental roof*, and not provided by their parents with the necessities of life, may bind themselves, by contract, to pay for their necessary meat, drink, apparel, physic, good teaching, and instruction. (*s*) It has been said that an infant may enter into a contract, under seal, "for his necessary meat and drink, or his necessary apparel or his fit schooling, and shall not avoid the same"; (*t*) but such contracts would, at the present day, be regarded with great jealousy and suspicion. The

(*q*) *Baker v. Keen*, 2 Stark. 502. *Nichole v. Allen*, 3 C. & P. 36. *Hesketh v. Gowing*, 5 Esp. 132. *Law v. Wilkin*, 6 Ad. & E. 718. *Mortimore v. Wright*, 6 M. & W. 485.

(*r*) *Duncomb v. Tickridge*, Aleyn, 94. *Bac. Abr. INF. (I.) 1.*

(*s*) *Bac. Abr. INFANCY (I).*

(*t*) *Perkins*, s. 14. *Russel v. Lee*, 1 Lev. 86.

¹ As to necessities, and what may be such, see *Breed v. Judd*, 1 Gray, 457; *Schofield v. White*, 29 Vt. 330; *Barber v. Vincent*, 1 Freeman, 531; *Rainwater v. Durham*, 2 Nott & McCord, 524. Schooling and instruction have been held to be necessities. *Tupper v. Caldwell*, 12 Metc. 562; *Rainsford v. Fenwick*, Carter, 216. But not a regular college education. *Middlebury College v. Chandler*, 16 Vt. 683. Generally, *Squier v. Hydleff*, 9 Mich. 274; *Mountain v. Fisher*, 22 Wis. 93; *Beeler v. Young*, 1 Bibb. 519; *Abell v. Warren*, 4 Vt. 149; *Phelps v. Worcester*, 11 N. H. 51; *Grace v. Hale*, 2 Humph. 27; *Mason v. Wright*, 13 Metc. 306; *Stanton v. Wilson*, 3 Day, 37; *Bent v. Manning*, 10 Vt. 225; *Rundell v. Keeler*, 7 Watts, 239; *Phelps v. Worcester*, 11 N. H. 51.

infant cannot bind himself to the payment of any particular sum for necessaries, or to give any particular price for them; for the law does not leave the determination of the amount to the infant, but intrusts it to the arbitrament of a jury. (*u*) An infant may be made liable for the rent of a fit and proper lodging, (*x*) also for lace, silks, and wedding garments, suitable for a person of his rank in life, (*y*) and for food, clothing, groceries, nursing, attendance, and necessaries furnished to his wife and family and infant children residing with him, (*z*) but not for premises hired to carry on trade. (*a*)

158. *Things held not to be necessaries.*—The question as to what things are, and what things are not, necessaries suitable for an infant who is living away from the parental roof, and supplies his own wants from funds of which he has himself the management, is a mixed question of law and fact, to be determined by the particular circumstances of each case. There are, however, many things which cannot be necessary for the use of an infant under any circumstances, and respecting which no valid contract can be entered into. (*b*) Thus, articles of mere luxury cannot be necessaries suitable to the condition of any infant. But articles of utility, although luxurious and expensive, may be; and whether they are so or not is a question for the jury in each particular case, subject to the control of the court as to their verdict. (*c*) If the

(*u*) *Cas. Law and Eq.* 185.

(*x*) *Kirton v. Elliot*, 2 *Buls.* 1. 69.
Evelyn v. Chichester, 3 *Burr.* 17 2.

(*y*) *Rainsford v. Fenwick*, *Car.* 215.
Dalton v. Gib, 5 *Bing. N. C.* 198.
Brashaw v. Eaton, *Id.* 234; 7 *Sc.* 183.

(*z*) *Bacon's Maxim*, *R.* 18, p. 67, ed. 1639.
Chapple v. Cooper, 13 *M. & W.* 259.

(*a*) *Lowe v. Griffith*, 1 *Sc.* 458. *Ante*, p. 238.

(*b*) *Brooker v. Scott*, 11 *M. & W.* 67.
Wharton v. Mackenzie, 5 *Q. B.* 606.
Burghart v. Angerstein, 6 *C. & P.* 698.
Charters v. Bayntun, 7 *Id.* 52.

(*c*) *Ryder v. Wombwell*, *L. R.*, 4 *Ex.* 32; 38 *L. J.*, *Ex.* 8.

infant be an invalid, and horse or carriage exercise is recommended by a medical man, and is resorted to by the infant for the restoration of his health, it will be considered necessary, and the infant will be bound to pay for it. (*d*)¹

159. *Things which may, or may not, be necessities according to circumstances.*—The infant's clothes may be fine or coarse according to his rank; his education may vary according to the station he is to fill, and the extent of his probable means when of age; and the nature and number of his servants and attendants will depend upon his position in society. (*e*) Expensive uniforms are necessary for infant officers in the guards, (*f*) and the ordinary volunteer regimentals to infant members of a volunteer corps. (*g*) Silks, furs, and velvets may be necessary for a young lady of rank and station in society, and a gold watch-chain and gold breast-pins for the use of the son of a gentleman of fortune. (*h*) A proper marriage settlement also is necessary for a female infant of rank and station about to be married; and she may therefore retain an attorney to draw it up. (*i*) If an infant widower gives directions for the funeral of a deceased wife, he is personally responsible for the expenses thereof; and the same liability arises in the case of an infant widow who has given an order to an undertaker for the burial

(*d*) Coleridge, J., *Wharton v. Mackenzie*, 5 Q. B. 612, 613.

(*e*) Alderson, B., *Chapple v. Cooper*, 13 M. & W. 258. *Hands v. Slaney*, 8 T. R. 578.

(*f*) *Burghart v. Hall*, 4 M. & W. 730.

(*g*) *Coates v. Wilson*, 5 Esp. 152.

(*h*) *Dalton v. Gib*, 5 Bing. N. C. 198. *Brayshaw v. Eaton*, Id. 231. *Peters v. Fleming*, 6 M. & W. 46. *Ford v. Fothergill, Peake*, 301.

(*i*) *Helps v. Clayton*, 17 C. B., N. S. 553; 34 L. J., C. P. 1.

¹ *Ante*, note 1, p. 116; *Middlebury College v. Chandler*, 16 Vt. 683.

of a deceased husband, although the latter may have died in insolvent circumstances. (*j*)

160. *Infant purchasers of estates and railway shares.*—An infant purchaser of real estate, who has taken possession, becomes liable to all the obligations attached to the estate, to pay rent in the case of a lease rendering rent, and to pay a fine due on admission in the case of a copyhold to which the infant has been admitted, unless he has elected to waive or disagree to the purchase altogether, either during infancy or after full age, at either of which times it is competent for an infant to do so. An infant who acquires railway shares is in the same situation as an infant acquiring real estate or any other permanent interest. If the infant repudiates the shares during his infancy, or as soon as he comes of age, he is not liable for the payment of calls made during his infancy; but, if there has been no such waiver or repudiation, and he continues to hold the shares after he becomes of age, he is liable for calls made on those shares during infancy, without any act of ratification on his part; and a plea of infancy at the time the calls were made is bad. (*k*) A transfer to an infant of shares in a company which becomes insolvent before the infant attains his majority, will be treated as a nullity. (*l*)

161. *Ratification of contracts made during infancy.*—“If an infant make a deed, and deliver it within age, and afterwards, upon his coming of full age, deliver it again, yet the deed is void; for the deed must take effect from the first delivery, or not at all.”

(*j*) *Chapple v. Cooper*, 13 M. & W. 259.

(*k*) *North-West. Rail. Co. v. McMichael*, 5 Exch. 123; 20 L. J. Ex. 99. *Newry & Ennis Rail. Co. v. Coombe*, 3 Exch. 565. *Dublin & Wick.*

Rail. Co. v. Black, 8 Exch. 181. *Mitchell's case*, L. R., 9 Eq. 363; 39 L. J. Ch. 199. *Ebbett's case*, L. R. 5 Ch. 302; 39 L. J., Ch. 679.

(*l*) *Capper's case*, L. R. 3 Ch. 458. *Mason's case*, Id. 459, n.

"By the Infants' Relief Act, 1874 (37 & 38 Vict., c. 62), s. 2, it is enacted that no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." As regards leases, however, if the infant accepts rent from lessee, and does acts affirmatory of the contract, the lease will *prima facie* be deemed to have been a necessary and beneficial lease, and will be valid and binding. If, on the other hand, the infant repudiates the contract on his attaining his majority, this will be evidence the other way. If an infant lessee remains in possession of property demised to him, and pays rent after he attains his majority, he cannot afterwards repudiate the lease. He becomes chargeable moreover, with all the arrears incurred during his minority; for, though at full age he might have departed from the bargain, and thereby have avoided payment of the arrears which the lessor suffered to accrue during the minority, yet his continuance in possession after his full age ratifies and affirms the contract *ab initio*, and so gives a remedy for the arrears of rent incurred from the time of the contract made. (*m*)¹ So an infant who

(*m*) Baylis, *v.* Dineley, 3 M. & S. Cro. Jac. 320. Kirton *v.* Elliott, 2 477. Bac. Abr. INF. (A); (K), 8. Smith Bulstr. 69.
v. Low, 1 Atk. 489. Ketsey's case,

¹ The subject of ratification by an infant, and of transactions by them, will be found to be regulated by the statutes of the different states. Thus, in Alabama, the contracts of an infant are made voidable only (*Shropshire v. Barns*, 46 Ala. 108). In Iowa, a minor is precluded from disaffirming a contract, where "the other party had good reason to believe the minor capable of contracting" (*Beller v. Marchant*, 30 Iowa, 350). The provision of the Kentucky Revised Statutes, ch. 22

has taken possession of land under a contract of sale and after coming of age has continued in possession and exercised acts of ownership, cannot avoid payment of the consideration. (n)

162. *Authentication of the ratification by a signed writing*—The 9 Geo. 4, c. 14, s. 15, enacts that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith, and (s. 8) that no writing made necessary by that act shall be deemed to be an agreement within the stamp acts. The mere fact of the confirmation or ratification of the debt, or of the making of the promise, is all that is required by the statute to be evidenced by writing. A date, therefore, is not necessary to the validity of the written instrument; nor need it be stated on the face of the writing that the debt was contracted during the infancy of the promisor; nor need the name of the creditor or of the party to whom the promise is made be expressed therein, or the amount of the debt. Oral evidence may be given for the purpose of establishing these necessary partic-

(n) *Henry v. Root*, 33 N. Y. 526.

§ 1, that "no action shall be brought to charge any person upon a promise to pay a debt contracted during infancy," does not apply to an action for necessities furnished the infant (*Bonney v. Reardin*, 6 Bush (Ky.) 34). To constitute a binding ratification of an infant's contract, such ratification must be made with the deliberate purpose of assuming a liability from which the person knows himself to be discharged by law (*Petty v. Roberts*, 7 Bush (Ky.) 410). And see, generally, *Minock v. Shortridge*, 21 Mich. 304; *Holt v. Baldwin*, 46 Mo. 265; *Johnston v. Furnier*, 69 Pa. St. 449; *Grant v. Beard*, 5c N. H. 129.

ulars. (o) Any written "declaration which recognizes the existence of the promise as binding is a ratification of it." (p) If an infant accepts a bill of exchange, or makes a promissory note during his infancy, and signs, after he has attained his majority, a written order or authority to his banker or agent, directing him to pay the amount of such bill or note, this is such a ratification of the contract as will render him liable to be sued upon it. (q)

The statute, it will be seen, requires the writing to be signed by the party himself, and does not, like the statute of frauds, provide for a signature by an agent. A letter, therefore, written by a wife in her husband's name, acknowledging the existence of a debt contracted by him during his infancy, and promising to pay the amount, will not bind the husband, although he may have expressly authorized his wife to write the letter and sign his name to it. (r) The ratification, when made in writing according to the statute, relates back and gives effect to the original claim, and fixes the defendant with an obligation springing out of the old contract. (s) If a promise in writing to pay the debt is made and signed by the party after he comes of age, this may, it seems, be treated either as a ratification and confirmation of the old contract, or as a new contract based upon and supported by the original consideration. (t) If an infant has borrowed money during his infancy, and, after he has attained his majority

(o) *Hartley v. Wharton*, 11 Ad. & E. 934.

(p) *Harris v. Wall*, 1 Exch. 130; 16 L. J., Ex. 270. *Rowe v. Hopwood*. L. R., 4 Q. B. 1. 38 L. J., Q. B. 1.

(q) *Hunt v. Massey*, 5 B. & A. 1. 902; 3 N. & M. 109.

(r) *Hyde v. Johnson*, 3 Sc. 296; 2 Bing. N. C. 776.

(s) *Gibbs v. Merrill*, 3 Taunt. 307. *Williams v. Moore*, 11 M. & W. 263. 264.

(t) *Cohen v. Armstrong*, 1 M. & S. 724. *Southerton v. Whitlock*, 2 Str 690. *Hyleing v. Hastings*, 1 Ld. Raym 389.

signs with his own hand a written promise to pay the amount, he will be liable upon such promise. (*x*) It has been said that, if the infant has given a bond to secure the repayment of the money, he cannot be sued upon any subsequent promise to pay the amount, as the specialty operates as an extinguishment of the simple contract debt. (*y*) But such a bond would be void, and any action brought thereon might be defeated by pleading the infancy of the obligee; it can hardly, therefore (being in itself an invalid and nugatory instrument), do away with the effect of a written promise made by the infant after he comes of age to pay the sum borrowed. (*z*)

If the promise to pay the debt is a conditional promise, such as a promise by the party to pay "as soon as he is able," the condition must be accomplished, and the ability of the party to pay must be established, before any action can be maintained upon the promise. (*a*) The promise to pay the debt must, in all cases, be made before action brought. (*b*) The promise must also, in all cases, be obtained without misrepresentation or fraudulent concealment. If a plaintiff has furnished a defendant, during his infancy, with things which were not necessities, and has obtained a promise from the latter, after he came of age, to pay for them, and has at the same time purposely kept back his account, and not given the defendant any opportunity of knowing the amount of the claim until after the promise to pay has been obtained, this will be strong evidence of fraud on the part of the

(*x*) *Ball v. Hesketh*, Comb. 381.

(*y*) *Tapper v. Davenant*, 3 Keb. 798; Bull. N. P. 153.

(*z*) *Edmond's case*, 3 Leon. 164.
Barton and Edmond's case, 4 Leon. 5.

(*a*) *Gould v. Shirley*, 2 M. & P. 581.

Scales v. Jacob, 3 Bing. 644; 11 Moore, 570. *Tanner v. Smart*, 6 B. & C. 609.

(*b*) *Thornton v. Illingworth*, 4 D. & R. 545; 2 B. & C. 824.

plaintiff, disentitling him to rely on the promise; (c) and, if the promise has been obtained by threats or by duress, it is of course void. (d) If an infant, having had dealings with an adult, meets and settles accounts with him during his infancy in the ordinary way, and a balance is struck, and on attaining his age of twenty-one years he confirms the settlement, and signs a written promise or agreement to pay such balance, he will be liable for the amount thereof. (e) But all statements of accounts with infants, made between them and their trustees or guardians, will be narrowly watched by the courts. And if any undue influence is used to obtain admissions or acknowledgments, or ratifications of undertakings and engagements entered into during infancy, the courts will set them aside. (f)

163. *Extortionate contracts with expectant heirs*, by creditors who take advantage of the pecuniary necessities of such heirs, will be set aside, and the jurisdiction of the courts is not affected by the 31 Vict., c. 4, s. 1, by which no purchase (which, by sect. 2, is to include every kind of contract, conveyance, or assignment, under or by which any beneficial interest in any kind of property may be acquired), made bona fide, and without fraud or unfair dealing, of any reversionary interest in real or personal estate, shall hereafter be opened or set aside merely on the ground of undervalue. (g)¹

(c) Brooke v. Galley, 2 Atk. 34.

Maitland v. Backhouse, 12 Jur.

(d) Harmer v. Killing, 5 Esp. 101. 45.

(e) Williams v. Moor, 11 M. & W. 264, 265.

(g) Miller v. Cook, L. R., 10 Eq. 641. Tyler v. Yates, L. R., 11 Eq.

(f) Allfrey v. Allfrey, 11 Jur. 981. 265; Id. 6 Ch. 665; 40 L. J., Ch. 11, Maitland v. Irving, 16 L. J., Ch. 95. 768.

¹ As to the disaffirmance of contracts by infants, there is much difference in the rulings of the different states. See, generally, Heath v. West, 6 Foster, 193; Car v. Clough, Id. 280; Roberts v. Wiggins, 1 N. H. 75; Jackson v. Carpenter, 11

A person collaterally responsible for an infant, cannot avail himself of the infancy of the principal debtor. (*h*) And the indoree of a negotiable instrument may maintain an action against the maker or acceptor, though the indorsor is an infant. (*i*)¹

164. *Contracts with executors.*—An executor may sell or pledge the assets of the testator, (*h*) and may

(*h*) Hartness v. Thompson, 5 John. 450. Nightingale v. Withington, 15 Mass. 273.

(*i*) Hardy v. Waters, 38 Maine, (*h*) Scott v. Tyler, 2 Dick, 712, 725.

Johns. 539; Jackson v. Burchin, 14 Id. 124; Willis v. Twombly, 13 Mass. 204; Knox v. Flack, 10 Harris, 337; Badger v. Phinney, 15 Mass. 359; Hubbard v. Cummings, 1 Greenl. 13; Roof v. Statford, 7 Cow. 183; Wheatley v. Mescal, 5 Ind. 142; Baldwin v. Van Deusen, 37 N. Y. 487; Crymer v. Day, 1 Bailey, 320; Jones v. Todd, 2 J. J. Marsh. 361. But, in cases of an executed contract, the rule is settled that, if it were beneficial to the infant, and entered into bona fide, the infant can not rescind, unless he can place the opposite party in statu quo. Middleton v. Hoge, 5 Bush (Ky.) 478; Bryant v. Pottinger, 6 Id. 473; Kerr v. Bell, 42 Mo. 120; Welch v. Welch, 103 Mass. 562; Breed v. Judd, 1 Gray, 457; Heath v. Stevens, 48 N. H. 251; Locke v. Smith, 41 Id. 346. But see Bartlett v. Cowles, 15 Gray, 445; Chandler v. Simmons, 97 Mass. 508; Gibson v. Loper, 6 Gray, 272; Price v. Furman, 27 Vt. 268; Bartlett v. Drake, 100 Mass. 176; Briggs v. McCabe, 27 Ind. 357; Miles v. Lingerian, 24 Id. 385.

"The true rule," says Story (Contracts, § 107), "seems to be, that when articles are furnished to the infant, which do not come within the definition of necessities, and which are consumed or parted with, or when money is lent, which is expended by the infant, that the other party has no remedy to recover an equivalent for the goods or the money, if the specific consideration given by him have been parted with, or be incapable of return. But wherever the specific consideration, whatever it be, exists and remains in the hands of the infant at the time of his disaffirmance of the contract, and is capable of return, the infant is bound to give it up, and he is treated as the trustee of the other party, if the contract be made originally in good faith."

¹ And so one who has paid off a mortgage on the land of infants cannot maintain an action against them for the money,

also sell part of the assets, at a fixed price, to a creditor of the testator, to clear the debt. (l)¹ He has, in fact complete and absolute control over the property of the testator, (m) notwithstanding it may be affected with some peculiar trust or equity in his hands; for the purchaser cannot be presumed to know that the sale may not be required, in order to discharge the debts of the testator, to which his property is legally liable before all other claims. But, if the purchaser knows that the executor is converting the estate into money for an unlawful purpose, the purchase will be set aside. (n) Thus, if a creditor of the executor buys or receives in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his debt, he is, generally speaking, a party to the breach of trust by the executor, because this sale or pledging is *prima facie* inconsistent with the duty of an executor. (o)²

If an executor or administrator takes a bond or contract, under seal, in his representative character, this is an obligation strictly personal to himself, upon which he can recover only in his own right. But, if the personal representatives, in the course of their administration, have themselves entered into simple contracts upon which a right of action has accrued. and the money, when recovered, would be assets, they

(l) *Hepworth v. Heslop*, 6 Hare, 561.

(n) *Elliot v. Merryman*, 1 W. & T.

(m) *Earl Vane v. Rigden*, L. R., 5 Lead. Cas. in Eq., 2d ed., p. 45, et Ch. 663. *Basset v. Nosworthy*, 2 W. seq.

& T. Lead. Cas. Eq., 2d ed. p. 1, et seq.

(o) *Keane v. Roberts*, 4 Mad. 357

although the mortgage was paid off at the request of their guardian. *Bicknell v. Bicknell*, 111 Mass. 265. The question is to what are necessities for an infant is one of fact for the jury. *Davis v. Caldwell*, Month. L. R. (N. S.) 165.

¹ *Evans v. Chew*, 71 Pa. St. 47. But see *Hamrick v. Craven*, 39 Ind. 24; *Estate of Ames*, 52 Mo. 290; *Matter of Saltus*, 3 Abb. (N. Y.) App. Dec. 243.

² *Ib.*

may sue in their representative capacity. (*p*) Thus, where executors carry on the business of their testator, the money recovered by them, upon contracts effected in carrying on the business, will be assets in their hands, and they may therefore sue for it in their representative capacity, (*q*) and it makes no difference that the materials supplied, under the contract, never belonged to the testator. (*r*)¹ They may also maintain an action, in their representative character, upon all negotiable securities which have been indorsed or made payable to them as executors or administrators, or generally, or individually, if the amount when recovered will be assets in their hands. If, by mistake, they pay away the money, or if they sell the goods, of their testator, or carry on his business for the benefit of his personal estate, and for the purpose of winding up his affairs, and enter into contracts in so doing, they may sue either in their representative capacity, or in their individual character, not naming themselves executors. (*s*) They should, however, upon

(*p*) *Heath v. Chilton*, 13 L. J., Ex. 228.

(*r*) *Abbott v. Parfitt*, *supra*.

(*s*) *Aspinall v. Wake*, 3 M. & Sc.

(*q*) *Moseley v. Rendell*, L. R., 6 Q. B. 383. *Abbott v. Parfitt*, L. R. 6 Q. B. 346, explaining *Bolingbroke v. Kerr*.

423; 10 Bing 51. *Grissell v. Robinson*, 3 Sc. 335. *Vanquelin v. Bouard*, 33 L. J., C. P. 78; 15 C. B., N. S. 341.

¹ See *Vaughan v. Stephenson*, 69 N. C. 212; *Farnham v. Mallory*, 2 Abb. (N. Y.) App. Dec. 100; *Smith v. Britton*, 45 How. (N. Y.) Pr. 428; *Beall v. New Mexico*, 16 Wall. 535; *Dunlop v. Newman*, 47 Ala. 429; *Neal v. Patten*, 47 Ga. 73; *Burnham v. Lasselle*, 35 Ind. 425; *Smith v. Dodds*, 35 Id. 452; *Stone v. Bancroft*, 108 Mass. 98; *Forist v. Androscoggin Co.*, 32 N. H. 477; *Evans v. Evans*, 23 N. J. Eq. 71; *Cool v. Higgins*, Id. 308; *Davis v. Fox*, 69 N. C. 435; *Parrish v. Brooks*, 4 Brews. (Pa.) 154; *Bouslough v. Bouslough*, 68 Pa. St. 495; *Brown v. Lewis*, 9 R. I. 497; *Thompson v. Branch*, 35 Tex. 21; *Dunzel v. Municipal Court*, 9 R. I. 189; *Stanley v. Mason*, 59 N. C. 1; *Russell v. Umphlet*, 27 Ark. 339; *Sanford v. McCree ly*, 24 Wis. 103; *Wilson v. Barclay*, 22 Gratt. 534, *Staggs v. Ferguson*, 4 Heisk. 670.

such contracts, sue in their representative capacity, in order to protect the assets from a set-off in respect of their individual debts. (*t*) The title of an administrator to the effects and personal estate of the deceased, though it does not exist until the grant of administration, relates back to the time of the death, so as to entitle the administrator to sue upon an implied contract of sale in respect of goods delivered to and received by a party before the grant of the letters of administration. And if an agent sells goods in ignorance of the death of the principal, the administrator may adopt the contract, and sue upon it in his representative character as soon as he has obtained letters of administration. (*u*)¹

165. *Interest of executors or administrators.*—As the executors unitedly represent the person of the testator, they are all jointly interested in contracts entered into with the deceased, although some of them be infants under the age of seventeen years, (*x*) unless they have renounced probate, in which case the right of representation devolves upon the others, just as if the parties making the renunciation had never been appointed executors. (*y*) But two of three co-executors may recover lands of their testator in ejectment on a joint demise by the two. (*z*) In contracts which have been entered into with the personal representatives themselves, in the course of their administration, all are jointly interested if the contract has been made on behalf of all; but where three out

(*t*) *Clark v. Hougham*, 2 B. & C. 155.

(*x*) *Foxwist v. Tremaine*, 2 Saund. 212.

(*u*) *Foster v. Bates*, 12 M. & W.

(*y*) 20 & 21 Vict. c. 77, s. 79.

326. *Welchman v. Sturgis*, 13 Q. B.

(*z*) *Doe v. Wheeler*, 15 M. & W.

555. *Bodger v. Arch*, 10 Exch. 340.

623.

¹ And see *Flood v. Pilgrim*, 3 Wis. 376; *McGonigal v. Calter*, Id. 614.

of four executors undertook the management of the testator's concerns, and possessed themselves of his property, and directed an auctioneer to sell certain portions of the estate, and sued for the price without joining the fourth, it was held that the action was well brought by the three who had authorized the sale, and were actual parties to the contract. (*a*)

166. *Liabilities of executors and administrators on their own contracts.*—We have already seen that a promise by an executor to pay a debt due from his testator will not make him personally liable *de bonis propriis*, unless there be some new and valid consideration for the promise. He is chargeable only thereon in his representative character to the extent of the assets in his hands, although the promise has been put into writing and signed by him, pursuant to the statute of frauds. (*b*)¹ But, if the executor binds himself by deed, without any fresh consideration, or if he gives a written undertaking or promise to pay the debt, founded on a new and valid consideration, such as the payment of money, the supply of goods, or the delivery of documents and evidences of title which the creditor has a right to retain, he will then be personally liable *de bonis propriis* upon the contract. (*c*) If the executor signs his name to a written undertaking to pay a debt due to a creditor of the deceased, in consideration that such creditor will give him time for payment, he will be personally responsible *de bonis propriis* upon this contract. (*d*) And, if an executor gives a written undertaking signed by him to a legatee,

(*a*) *Brassington v. Ault*, 9 Moore, 343.

(*b*) *Nelson v. Serle*, 4 M. & W. 795.

2 *Wms. Saund.* 137, n. (*a*). *Hamilton*

v. Terry, 21 L. J., C. P. 132.

(*c*) *Wheeler v. Collier*, Cro. Eliz. 406.

Hamilton v. Incledon, 4 Bro. P. C. 4

(*d*) *Johnson v. Whitcchott*, 1 Reil.

Abr. 24. *Hawes v. Smith*, 2 Lev. 122

Fish v. Richardson, Yelv. 55. *Bradly*

v. Heath, 3 Sim. 543.

¹ See *Huston v. Huston*, 29 Iowa, 347.

promising to pay a legacy bequeathed to the latter in consideration that the legatee will forbear for a certain time from taking proceedings to obtain payment of the legacy, he will render himself personally responsible for the payment of the legacy, as being then a debt due from him to the legatee. (*e*)

If an executor signs a promissory note as executor, whereby he promises to pay a sum of money with interest to the promisee, he cannot escape from his liability for the payment of the money to the latter by showing that the amount promised to be paid was a debt due from his testator, or that it was a legacy bequeathed to the promisee, and that he, the executor, has fully administered, &c.; for the giving of such a security by the personal representative to the creditor or legatee imports an agreement for forbearance, and binds him individually, and supersedes the necessity of proving assets. (*f*)¹ If executors have effected a policy of insurance to insure the estate against loss, they will be responsible if they allow the policy to drop without consulting the parties beneficially interested, or resorting to the court. (*g*) If they give orders for the funeral of their deceased testator or intestate, or adopt or sanction the acts of those who have given such orders, they will themselves be personally responsible *de bonis propriis* to the parties who have fulfilled the orders. (*h*) If the executor

(*e*) *Davis v. Reyner*, 2 Lev. 3; 1 fret, 5 Myl. & Cr. 71. *Ridout v. Bris-*
Ventr. 120; 2 Wms. Saund. 137, n. tow, 1 Cr. & J. 231.

(*d*). (*g*) *Garner v. Moore*, 24 L. J., Ch.

(*f*) *Childs v. Monins*, 5 Moore, 687. 22 & 23 Vict. c. 35, s. 30.
 282; 2 B. & B. 460. *Barnard v. Pum-*

(*h*) *Brice v. Wilson*, 3 N. & M. 512;
 8 Ad. & E. 349, n. (c.)

¹ *Funderbunk v. Gorham*, 46 Ga. 296; *Dickson v. Comp-*
ton, 24 La. An. 83. And see *McMahan v. Harbert*, 35 Tex.
 451; *Dorsheimer v. Rorback*, 23 N. J. Eq. 46; *Livingston v.*
Ganssen, 21 La. An. 286; *Kessler v. Hall*, 64 N. C. 60.

continues the trade of the testator, he will of course be personally responsible *de bonis propriis* upon all contracts entered into by him in carrying on such trade, although he receives no part of the profits, and acts strictly as trustee; (*i*) and, by the law of England, executors and trustees taking shares in joint-stock companies make themselves personally liable as partners, even though they describe themselves as trustees, and they are deemed to have intended to bind themselves absolutely; for, if it were held that persons entering into contracts with a trustee were really contracting, not with the individual, but with the trust estate, it would be necessary to examine beforehand the state and amount of the trust estate, and the powers of the trustee; and it could not afterwards be dealt with or disposed of until the consequences of the contract were ascertained. (*k*) If an executor after the death of the testator, borrows money, although for the purposes of the estate, he is only liable personally, and the lender cannot prove against the estate. (*l*) But, when there is a promise by an executor, founded upon a previous contract made by the testator, the executor may be sued in his representative character so as to charge the assets. (*m*) So he may be sued in his representative capacity for money paid to his use, but only when the matter arises out of a contract with or something done by the testator. (*n*)

167. *Liability of executors and administrators for the acts of each other.*—Upon contracts that have been entered into by the personal representatives themselves in the course of their administration they

(*i*) *Whiteman v. Townroe*, 1 M. & S. 412. *Ex parte Garland*, 10 Ves. 119. (*l*) *Farhall v. Farhall*, L. R., 7 Ch. 123; *Dowse v. Cox*, 3 Bing. 20.

(*m*) *Farhall v. Farhall*, *supra*.

(*k*) *Lumsden v. Buchanan*, 4 Macq. H. L. Cas. 950. (*n*) *Powell v. Graham*, 7 Taunt. 581.

are jointly liable, if they are jointly parties to the contract, or if one of them has contracted as a recognized or authorized agent on behalf of all; but one executor has no implied authority to bind his co-executors for anything beyond the reasonable and necessary expenses for the funeral of the deceased. An infant executor is not liable upon contracts made by the personal representatives themselves in the course of their administration.¹

168. Rights of the husband upon contracts made with the wife during coverture.—By the common law the husband is entitled to the benefit of all contracts

¹ See *People v. White*, 12 Ill. 151; *Miller v. Williamson*, 5 Md. 219; *Rogers v. Fort*, 19 Ga. 94; *Sandford v. Thompson*, 18 Ga. 554; *Willis v. Willis*, 16 Ala. 652; *Merselis v. Merselis*, 3 Halst. Ch. 557; *Strong v. Wilkison*, 14 Miss. 116; *Johnson v. Fuguay*, 1 Dana, 514; *Cartwright v. Cartwright*, 4 Hay. 134; *Stephenson v. Axson*, 1 Bailey Ch. 274; *Huson v. Wallace*, 1 Rich. Ch. 1; *Frescott v. Frescott*, 1 McCord Ch. 417; *Darrel v. Eden*, 3 Id. 241; *Morton v. Smith*, 1 Dessaus, 128; *McNair v. Ragland*, 1 Dev. Eq. 516; *Deas v. Span*, 1 Harp. Ch. 176; *Glover v. Glover*, 1 McMillan Ch. 153; *O'Dell v. Yound*, Id. 155; *Webb v. Billinger*, 2 Dessaus, 482; *Doud v. Saunders*, 1 Harp. Ch. 277; *Whitted v. Webb*, 2 Dev. & B. Ch. 442; *Williams v. Maitland*, 1 Ired. Ch. 92; *Wiegand's Appeal*, 4 Casey, 471; *McNair's Appeal*, 4 Rawle, 148; *Brown's Appeal*, 1 Dallas, 311; *Sterrett's Appeal*, 2 Pa. 420, 421; *Vernon v. Henry*, 6 Watts, 192; *Boyd v. Boyd*, 1 Id. 307; *Stell's Appeal*, 10 Burr. 152, 153; *Bunting's Appeal*, 4 Watts, 469; *Ducommun's Appeals*, 5 Harris, 271; *Harding v. Evans*, 3 Part. 221. And see, as to the executor's general liability, *Calhoun's Estate*, 6 Watts, 185; *Lovell v. Field*, 5 Vt. 218; *Werner's Estate*, 6 Watts, 250; *Long's Estate*, Id. 46; *Dillabaugh's Estate*, 4 Id. 177; *Eno v. Cornish*, Kirby, 297; *Betts v. Blackwell*, 2 Stew. & Port. 373; *De Diemar v. Van Wagenen*, 1 Johns. 404; *Murdoch v. Matthews*, Brayt. 103; *Jeeter v. Durham*, 6 J. J. Marsh. 228; *Taliaferro v. Robb*, 2 Cal., 258, *Alsop v. Mather*, 8 Conn. 584; *Newsum v. Newsum*, 1 Leigh, 86; *Voorhies v. Stoothoff*, 6 Halst. 145; *Wade v. Wade*, 1 J. J. Marsh. 447; *Petition of Richmond*, 2 Pick. 567; *English v. Harvev*, 2 Rawle. 305; *Liddel v. McVickar*, 6 Halst. 44.

executed by the wife, and of all executory contracts made by her without his knowledge but for his benefit. (o)¹ In some cases the husband is solely entitled to the benefit of the wife's contracts, in others he may elect to give her an interest by joining her as a co-plaintiff in any action brought to enforce them. At common law in the case of all simple contracts made with the wife, except bills of exchange and promissory notes, the husband alone took the benefit unless there was an express promise made to the wife, and unless the consideration upon which the promise was founded moved from her; (p)² for, if the wife rendered services without any express promise of remuneration having been made to her, the husband alone was entitled to the benefit of the contract, because he was entitled to the fruits of her labor; (q) and, where the personal skill of the wife did not alone form the consideration for the promise, but materials were provided which were the property of the husband, he alone could enforce the contract. (r) Thus, where a

(o) *Millard v. Harvey*, 34 Beav. Jac. 77, 205. *Fountain v. Smith*, 2 Sid. 128. Roll. Abr. 32, pl. 12.

(p) *Buckley v. Collier*, 1 Salk. 114.

(r) *Holmes v. Wood*, 1 Barn. 75

(q) *Brashford v. Buckingham*, Cro. 249.

¹ "It is the policy of the law, in order to prevent domestic discord, to create a legal unity," says Story (on Cont. § 144) "between husband and wife." It therefore makes the will of one paramount, according to the Homeric maxim (Ill. β'. 204). *Οὐκ ἀγαθὸν πολυκοιρανίῃ εἰς κοίρανος ἔστω*. And see a Latin rhyme, quoted by Coke, in his first Institute, as to the revival of the wife's supremacy during her husband's transportation beyond the realm:

Ecce modo mirum, quòd fœmina fert breve Regis,
Non nominando virum conjunctum robore Legis.

Co. Litt. 1326. Alluding to the then famous case of a Lady Belknap, who brought an action in the common pleas during her husband's banishment.

² See *Abbott v. Winchester*, 105 Mass. 115; *Chapman v. Kellogg*, 102 Id. 246.

husband and wife sued jointly to recover money lent by the wife, and the declaration stated a promise to them to repay the money, and alleged a breach by non-payment *ad damnum eorum*, it was held that they could not maintain a joint action, as a *femme covert* could not be possessed of money jointly with her husband. (s) So, where an action was brought by husband and wife for the use and occupation of a messuage and lands, for money had and received to the use of the husband and wife, and for money due on accounts stated between them, stating the promises and laying the damages to them jointly, it was held, in arrest of judgment, that the entire damage resulted to the husband, and that the action ought to have been brought in his name alone. (t) ¹

In the case of bills and notes made payable to the wife during the coverture, the husband may take the sole benefit, (u) ² or he may, at his option, give his wife an interest therein, by joining her with him as a co-plaintiff. (v) And the law is the same in the case of bonds and other personal contracts under seal entered into during the coverture with the wife separately, or with the husband and wife jointly. (x) The wife, indeed, may sue alone and recover upon a contract under seal made with her during coverture, if the coverture is not pleaded. (y) And, where a married woman brought

(s) *Abbot v. Blofield*, Cro. Jac. 644.
King v. Bassingham, 8 Mod. 199.

(t) *Bidgood v. Way*, 2 W. Bl. 1236.
Johnson v. Lucas, 1 Ell. & B. 659;
 22 L. J., Q. B. 174.

(u) *Burrough v. Moss*, 10 B. & C. 558.

(v) *Phillis Kirk v. Pluckwell*, 2 M. & S. 393.

(x) *Howell v. Maine*, cited 2 M. & S. 396. *Ankerstein v. Clarke*, 4 T. R. 616. *Arnold v. Revault*, 4 Moore, 71; 1 B. & B. 443. *Hellyer v. Grace*, Styles, 9.

(y) *Bendix v. Wakeman*, 12 M. & W. 97. *Gayard v. Sutton*, 3 C. B. 153.

¹ See *Farrar v. Bessey*, 24 Vt. 89.

² See *Abbott v. Winchester*, 105 Mass. 115; *Chapman v. Kellogg*, 102 Id. 246.

an action of debt on simple contract in her own name against a railway company for dividends due on shares standing in her name, it was held that she was entitled to recover the non-joinder of the husband not having been pleaded in abatement. (*s*)¹

(*s*) *Dalton v. Mid. Ry. Co.*, 13 C. B. 474; 22 L. J., C. P. 177.

¹ See *Dunn v. Sargent*, 47 Mo. 17. The statutes of many of the states vary the common law as to the separate property-rights of the wife. See, generally, in the various states, *Prout v. Roby*, 15 Wall. 471; *Hayt v. Parks*, 39 Conn. 357; *Vance v. Nagle*, 70 Pa. St. 176; *Woodford v. Stephens*, 51 Mo. 443. *Cowles v. Marks*, 47 Ala. 612; *Dubose v. McDonald*, 46 Ga. 471; *Cain v. Furlow*, 47 Id. 674; *Allen v. Eldridge*, 1 Col. T. 287; *Mills v. Angela*, Id. 334; *Holliday v. Dailey*, Id. 460; *Jenkins v. Flinn*, 37 Ind. 349; *Vinnedge v. Shaffer*, 35 Id. 341; *Knight v. McDonald*, 37 Id. 463; *Knaggs v. Wastin*, 9 Kan. 532; *Falconer v. Stapleton*, 24 La. An. 89; *Harding v. Cobb*, 47 Miss. 599; *Allen v. Johnson*, 48 Id. 413; *Pike v. Miles*, 23 Wis. 164; *Boos v. Jomber*, 24 Id. 392; *Voorhies v. Bonestiel*, 16 Wall. 16. In *King v. O'Brien*, 33 N. Y. Superior Court, 49, it was held, that where a marriage takes place in England, and the parties subsequently come to New York, the wife bringing with her certain money, part of which belonged to her before marriage, and the balance of which she acquired in England, subsequent to the marriage, by her own labor, the title to and property therein is governed by the law of England, and not by the statutes of the state of New York.

Alabama—*Elliot v. Wade*, 17 Ala. 456; *Cowles v. Marks*, 47 Id. 612.

California—*Porter v. Gumba*, 43 Cal. 105; *Love v. Watkins*, 40 Id. 574.

Colorado Territory—*Allen v. Eldridge*, 1 Col. T. 287; *Mills v. Angela*, Id. 334; *Holliday v. Dailey*, Id. 460.

Connecticut—*Hayt v. Parks*, 39 Conn. 357; *Craft v. Rollan*, 37 Id. 491.

Delaware—*State v. Gorman*, 4 Houst. 624; *Doe v. Wright*, 2 Id. 49; *Doe v. Collins*, Id. 128.

Georgia—*Dubose v. McDonald*, 46 Ga. 44; *Cain v. Furlow*, 47 Id. 674.

Illinois—*Thomas v. Chicago*, 55 Ill. 403; *Bridgford v. Riddell*, Id. 261.

Iowa—*Mitchell v. Smith*, 32 Iowa, 484.

169. Rights of the surviving wife.—If the wife survives the husband, she is entitled to the benefit of all contracts under seal entered into during the cover-

Indiana—Simms v. Rickets, 35 Ind. 181; Morceau v. Branson, 37 Id. 195; Higgins v. Willis, 35 Id. 371; Capp v. Stewart, 38 Id. 479; Hosheagen v. Speaker, 36 Id. 413; Jenkins v. Flinn, 37 Id. 349; Vinnedge v. Shaffer, 35 Id. 341; Knight v. McDonald, 37 Id. 463.

Kansas—Wicks v. Mitchell, 9 Kan. 80; Knaggs v. Mastin Id. 532.

Kentucky—Uhring v. Horstman, 8 Bush. 172; Hathaway v. Yeaman, Id. 391.

Louisiana—Urquhart v. Thomas, 24 La. An. 95; Wells v. Citizens' Bank, Id. 273; Falconer v. Stapleton, Id. 89.

Maine—Lee v. Lanahan, 59 Me. 478.

Maryland—Hall v. Eccleston, 37 Md. 510; Rice v. Hoffman, 35 Id. 344.

Massachusetts—Bancroft v. Curtis, 108 Mass. 47; Athol, &c. Machine Co. v. Fuller, 107 Id. 437.

Michigan—De Fries v. Conklin, 22 Mich. 255; Burchard v. Frazer, 23 Id. 224.

Mississippi—Dozier v. Freeman, 47 Miss. 647; Witcher v. Wilson, Id. 663; Clopton v. Matthews, 48 Id. 286; Drube v. De Lassus, 51 Mo. 165; Harding v. Cobb, 47 Miss. 599; Allen v. Johnston, 48 Id. 413.

Missouri—Lincoln v. Rowe, 51 Mo. 571; Woolford v. Stephens, Id. 443.

Montana Territory—Griswold v. Baley, 1 Mon. T. 545.

New Hampshire—Sanborn v. Batchelder, 51 N. H. 426.

New Jersey—Perkins v. Elliott, 3 N. J. Eq. 526; Hanford v. Bockee, 20 Id. (5 C. E. Green), 101.

New York—Prevot v. Lawrence, 51 N. Y. 219; Phillips v. Wicks, 45 How. Pr. 477; Hinckley v. Smith, 51 N. Y. 21; Kidd v. Conway, 45 Barb. 158; Lennox v. Eldred, 65 Id. 410; Loomis v. Ruck, 14 Abb. Pr. 385; Prendergast v. Borst, 7 Lans. 489; Freckling v. Rolland, 33 N. Y. Superior Ct. 499; Barry v. Equitable Life Ins. Co. 14 Abb. Pr. 385; Voorhies v. Bonestiel, 16 Wall. (U. S.) 116; Perkins v. Perkins, 62 Barb. 531; Briggs v. Mitchell, 66 Id. 288.

North Carolina—Teague v. Downs, 69 N. C. 280; Withers v. Sparrow, 66 Id. 129.

Ohio—Hamilton v. Taylor, 2 Cinc. 402; Logan v. Thrift, 20 Ohio St. 62; Phillips v. Graves, Id. 371.

ture with herself alone, or with her husband and herself jointly, (a) but she may waive her right to the instrument; and it then becomes the obligation of the husband alone.' To a debt due on a joint judgment recovered by herself and husband during the coverture, the wife is also entitled by survivorship. (b) The surviving wife is entitled also to all promissory notes and bills of exchange made payable to her during the coverture, and to all express simple contracts where the promise has been made to herself during the marriage, and the consideration to support it has moved from her. (c) Where a feme covert administratrix received a sum of money in that character, and lent the same to her husband, taking in return for it the joint and several promissory notes of her husband

(a) 1 Roll. Abr. 349 (B). *Coppin v. Nash v. Nash*, 2 Mad. 133. *Gatters v. Madeley*, 6 M. & W. 423. —, 2 P. W. 496.

(b) Com. Dig. Bar. et Feme, F. 1 *Fleet v. Perrins*, L. R., 4 Q. B. *Glander v. Baston*, 1 Vern. 396. 500.

Oregon—*Starr v. Hamilton*, Deady, 268; *Dick v. Hamilton*, Id. 322; *Lamb v. Starr*, Id. 447.

Pennsylvania—*Keen v. Philadelphia*, 8 Phil. (Pa.) 49; *McNickle v. Henry*, Id. 87; *McGrath v. Pennsylvania, &c., Co.*, Id. 113; *Curl v. Smith*, Id. 569; *McGregor v. Sibley*, 69 Pa. St. 388; *McAboy v. Johns*, 10 Id. 9; *Moore v. Cornell*, 68 Id. 320; *Burns v. Young*, 3 Pittsb. 92; *State v. Meek*, 70 Pa. St. 181; *Butts v. Newton*, 27 Wis. 632; *Cleaver v. Sheetz*, 70 Pa. St. 496; *Gamble's Estate*, 5 Pa. L. J. R. 404; *Commonwealth v. Martin*, Id. 245; *Shade v. Shade*, Id. 93; *Sheets v. Cleaver*, 8 Phil. 3.

Rhode Island—*Hodges v. Hodges*, 9 R. I. 32.

South Carolina—*Charlec v. Coker*, 2 S. C. 122.

Tennessee—*Gray v. Robb*, 4 Heisk. 74; *Shacklett v. Polk* 4 Id. 104.

Texas—*Bryans v. Holliman*, 34 Tex. 403.

Vermont—*Morton v. Onion*, 45 Vt. 145; *Gill v. Cook*, 42 Id. 140; *Child v. Pearl*, 43 Id. 224.

Virginia—*Muller v. Bayley*, 21 Gratt. 521.

West Virginia—*McClintic v. Ocheltree*, 44 W. Va. 249.

Wisconsin—*Norry v. Doane*, 1 Biss. 64.

and two other persons payable to her with interest, and the husband died, it was held that the note was a chose in action surviving to the wife. (*d*) As regards a simple contract, however, made with the wife alone, or with the husband and wife jointly during coverture, the husband may elect to let his wife have the benefit of it by survivorship, or he may take it himself. If in his lifetime, he brings an action upon the contract in his own name, that amounts to an election to appropriate it to himself, and the wife cannot consequently, in this case, take it by survivorship. (*e*) If he joins his wife as a party suing on the contract and dies, she may, by entering a suggestion of his death upon the record, prosecute the suit to judgment for her own sole use and, even if judgment has been signed in the action so commenced prior to the husband's death, but no execution has been levied, the benefit of the judgment will survive to the wife, and she may forthwith issue execution thereon for her own use. (*f*)

The common law rights of the husband to the benefit of contracts made by the wife during coverture have, however, been modified by the 33 & 34 Vict. c. 93 which enables a married woman to maintain an action in her own name for the recovery of any wages or earnings acquired or gained by her after the passing of the act, in any employment, occupation, or trade, in which she is engaged, or which she carries on separately from her husband, or for any money or property acquired by her through the exercise of any literary, artistic, or scientific skill; and such wages, earnings, money, and property, and all investments thereof, are to be deemed and taken to be property settled to her

(*d*) *Richards v. Richards*, 2 B. & Ad. 447.

(*e*) *Scarpellini v. Atchison*, 7 Q. B. 864.

(*f*) *Sherrington v. Yates*, 12 M. & W. 865. *Bond v. Simmons*, 3 Atk. 21. *Nanney v. Martin*, 1 Ch. C. 27.

separate use, independent of any husband to whom she may be married; and her receipts alone will be a good discharge for such wages, earnings, money, and property. (*g*)¹

170. *Inability of married women to bind themselves or their husbands by deed.*—The husband cannot be sued upon any contract under seal entered into and executed by the wife in his name or on his behalf, unless he has given her a power of attorney under seal to contract for him by deed, or unless the deed is sealed and delivered by her in his name, in his presence, and by his commandment. Neither is the wife herself liable upon the deed by reason of her coverture. (*h*) But if work has been performed, or services rendered, or goods supplied for the use of the husband upon the faith of a covenant by the wife for payment or remuneration, the husband is liable for the fair value of the work and services, and of the goods supplied, just as if the covenant had never been in existence. (*i*)

171. *Authority of the wife to sign writings for the husband.*—The liability of the husband upon simple contracts made or signed by the wife during the coverture depends upon the nature of such contracts, and of the things stipulated and agreed to be done. No power of attorney is requisite to enable the wife to bind the husband by simple contract; but the latter will be held liable, provided he appears to have expressly or impliedly sanctioned what she has done.

(*g*) 33 & 34 Vict. c. 93, ss. 1 & 11.

(*i*) *White v. Cuyler*, 1 Esp. 200; 6

(*h*) *Lampert v. Atkins*, 2 Camp. 176.

273. Cod. lib. 4, tit. 12, lex. 1.

¹ If a husband and wife own a vessel, of which he is master, they are jointly liable on contracts for its employment made by him within the scope of a master's authority (*Reinman v. Hamilton*, 111 Mass. 245).

(*k*)¹ The wife is not the agent of the husband in respect of the management of his estate and business, (*l*) unless he has entrusted her with the general management of it, in which case he makes her his general agent for the carrying of it on, and clothes her with an implied authority to enter into all such contracts and agreements as are usual and necessary for the purpose; and he is consequently responsible for the fulfillment of all contracts that may be entered into by her in the execution of her task, just as if they had been made by any ordinary general agent employed by him in the matter. (*m*) Bills of exchange and promissory notes, for example, drawn, accepted, or indorsed by a wife, who is intrusted by the husband with the conduct and management of a business in the carrying on of which it is usual to negotiate such securities, are binding upon the husband; but if she is not carrying on the husband's business, it must be shown that she acted by his express authority. (*n*) The wife may be clothed with an express or implied authority to bind the husband by signing her own name as well as the husband's name; and the husband may accept bills and contract in his wife's name as well as in his own name. (*o*) A wife who has the conduct of her husband's business, and who is in the habit of drawing, accepting, and indorsing bills and notes in his name, may draw and indorse by the hand of her daughter (the daughter being in her presence and acting under her immediate direction), without

(*k*) *M'George v. Egan*, 7 Sc. 112.

(*l*) *Meredith v. Footner*, 11 M. & W. 202.

(*m*) *Petty v. Anderson*, 10 Moore, 577.

(*n*) *Prestwick v. Marshall*, 5 M. & P. 513; 7 Bing. 565. *Cotes v. Davis*, 1 Campb. 485. Code Nap. L. 1, tit. c. 6, 220.

(*o*) *Lindus v. Bradwell*, 5 C. B. 583 17 L. J., C. P. 123.

¹ See *Schmidt v. Postel*, 63 Ill. 58.

violating the rule *delegatus non potest delegare*. (*p*) The husband is not liable for any fraud of the wife which is directly connected with and dependent upon a contract. (*q*)¹

172. *Loans of money to the wife.*—A married woman has in general no implied authority to borrow money and charge the husband with the re-payment of it. (*r*) But such small amounts as a wife may require upon an emergency for her household expenses, medicines, or necessities, a third party would be justified in lending her; (*s*) and a person who has advanced money to the wife for necessities may be entitled to stand in the place of the person who actually supplied the necessities. (*t*)

173. *Sale of goods to married women.*—Every married woman residing with her husband, and having the general management of his house and household affairs, is presumed to be his general agent in all matters connected with the domestic economy of the house and family.² She is, therefore, clothed with an implied authority from the husband to give orders for wearing apparel, furniture, provisions, and all such things as may fairly be presumed necessary for the decent maintenance of herself, her husband, and family, and the general comfort and enjoyment of the household, according to the apparent circumstances and

(*p*) Lord v. Hall, 8 C. B. 631.

(*s*) Harris v. Lee, 1 P. Wms. 482.

(*q*) Wright v. Leonard, 11 C. B., N. S. 258; 30 L. J., C. P. 365.

(*t*) Jenner v. Morris, 29 L. J., Ch. 923. Daudson v. Wood, 1 De G. J. & S. 465; 32 L. J., Ch. 400.

(*r*) Knox v. Bushell, 3 C. B., N. S. 335.

¹ But see Adams v. Mills, 38 N. Y. Superior Court (J. & S.) 16. A deed by a man and wife of her land, made while he was insane, is by the Massachusetts statutes void and not voidable (Leggate v. Clark, 111 Mass. 308; and see Becton v. Selleck, 48 Ala. 226).

² Story on Cont. § 164; Swain v. Duane, 48 Cal. 358.

situation in life of her husband, and the position in society which he allows her to assume. (*u*)¹ But a wife has implied authority to pledge her husband's credit for such things only as fall within the domestic department ordinarily confided to the wife's management, and are necessary and suitable to the style in which her husband chooses to live. (*v*) And this presumption of the wife's authority may be rebutted by proof that the husband had furnished her with ready money to pay for what was necessary, and had forbidden her to pledge his credit, (*w*) or that the wife had, during the husband's absence and without his knowledge, placed herself under the protection of a man with whom she was living in adulterous intercourse. (*x*) The implied authority, however, to bind the husband, resulting from cohabitation, "may be discharged by the prohibition and countermand of the husband." (*y*) The wife has no implied authority to run into extravagance, and to give orders which are beyond the husband's means. If, therefore, wines and spirits, or extravagantly expensive dresses, expensive music, jewels, and articles of luxury and ornament, are ordered by the wife, there must be reasonable evidence to show that the wife has made the contract with the knowledge and assent of the husband. (*z*) If a tradesman finds a wife giving extravagant orders, unsuited to

(*u*) *Etherington v. Parrot*, 1 Salk. 118. *Waithman v. Wakefield*, 1 Campb. 120. *Clifford v. Laton*, 3 C. & P. 16. *Byles, J., Jolly v. Rees*, 15 C. B., N. S. 643; 33 L. J., C. P. 177.

(*v*) *Phillipson v. Hayter, L. R.*, 6 C. P. 38; 40 L. J., C. P. 14.

(*w*) *Jolly v. Rees*, 15 C. B., N. S. 643.

(*x*) *Atkins v. Pearce*, 2 C. B., N. S. 763; 26 L. J., C. P. 252.

(*y*) *Manby v. Scott*, Bridg. Judg. by Bennett, 229. 1 Bac. Abr. 717. 2 Smith's L. C. 375, 5th edit. *Jolly v. Rees*, *supra*.

(*z*) *Metcalf v. Shaw*, 3 Campb. 22. *Spradbury v. Chapman*, 8 C. & P. 371. *Reneaux v. Teakle*, 8 Exch. 680. *Ried v. Teakle*, 13 C. B. 627; 22 L. J., C. P. 161.

¹ See *Eames v. Sweetzer*, 101 Mass. 78; *Furlong v. Hyson*, 35 Me. 333.

the husband's estate and apparent condition of life, he ought, if he intends to look to the husband for payment, to ascertain whether the latter is aware of the wife's extravagance, and whether he does or does not sanction it. (a)¹ Where a married lady went to a watering-place without her husband, and ordered expensive articles of dress, unsuited to her husband's circumstances, and the latter disapproved of her extravagance as soon as he was aware of it, it was held that he was not responsible for the price of the things supplied to her. (b) If a married woman obtains silks on credit, and pawns them, the husband is not bound to pay for them, as they never came to his use; but it is otherwise if they are made up and sent home and worn by the wife in his presence. (c)²

(a) *Montague v. Benedict*, 3 B. & C. 631. *Lane v. Ironmonger*, 13 M. & W. 369. *Seaton v. Benedict*, 2 M. & P. 66; 5 Bing. 28.

(b) *Atkins v. Curwood*, 7 C. & P. 756.
(c) *Etherington v. Parrot*, 1 Salk. 118.

¹ 2 Story on Cont. § 164; *Sulter v. Martin*, 50 Ga. 242.

² The law as to necessities is one that must vary with the circumstances of each case. So a husband has been held liable for the fees of attorneys employed by her to defend her against a prosecution instituted by her husband to compel her to find sureties to keep the peace (*Warner v. Heiden*, 28 Wis. 517. But see *Ray v. Raden*, 50 N. H. 82; *Wren v. Hurlburt*, 15 Vt. 607; *Shelton v. Pendleton*, 18 Conn. 417; *Coffin v. Dunham*, 8 Cush. 404). But a pew in a church has been held not a necessary for a wife, so that a husband would be liable for the rent thereof (*St. John's Parish v. Bronson*, 40 Conn. 75). And see, generally, *Johnston v. Allen*, 39 How. Pr. 506; *Bonney v. Reardin*, 6 Bush. 34; *McCreedy's Case*, 1 Tuck. 374; *Mulvey v. State*, 43 Ala. 316; *Knowles v. Hull*, 99 Mass. 562; *Day v. Wamsley*, 33 Ind. 145; *Anderson v. Smith*, 33 Md. 465; *Eames v. Sweetser*, 101 Mass. 78; *Woolford v. Burns*, 43 Vt. 330; *Stevens v. Story*, Id. 327; *Hultz v. Gibbs*, 66 Pa. St. 360. *Walker v. Simpson*, 7 Watts & S. 83; *Franklin v. Foster*, 20 Mich. 75; *Furlong v. Hysom*, 35 Me. 333; *Eames v. Sweetzer*, 101 Mass. 78; *Wood v. O'Kelley*, 8 Cush. 406. A son-in-law is liable to his father-in-law for necessities

174. *Proof of the assent of the husband to the wife's contracts.*—But the law, whilst discouraging the covert pandering of tradesmen to the extravagance of married women, expects from the husband some exercise of his marital control, for the purpose of checking such extravagance when he has the power of interference and prevention. When, therefore, a husband, living under the same roof with his wife, sees her attired in costly dresses and indulging in expensive ornaments, and fails to manifest his disapprobation by any active interference or opposition, making no inquiry as to where the articles come from, and giving no intimation to the tradesmen, who supply them, of his intention not to pay for them, he will be presumed to assent to the wife's acts and proceedings, in accordance with the maxim, *qui non prohibet quod prohibere potest assentire videtur*. (*d*)¹ “If the husband,” observes Lord Ellenborough, “has any control over goods improvidently ordered by the wife, so as to have it in his power to return them to the vendor, and he does not return them or cause them to be returned, he adopts his wife's act, and renders himself answerable. Nor is it any excuse, in law, that the wife is unmanageable and disobedient, as he must be supposed to exercise his marital rights, and to regulate

(*d*) Parke, B., *Morgan v. Thomas*, a. *Morton v. Withers*, Skin. 8 Exchequer, 307. 2 Institute, 305, 348.

furnished the former's wife, though there was no implied promise to pay for them (*Biddle v. Frazier*, 3 Houst. 258). A step-father, however, is not under any legal obligation to support the children of his wife by a former marriage (*Altridge v. Billings*, 57 Ill. 489). A husband is liable for necessary medical advice and attendance to the wife, unless the credit was given directly to the wife (*Carter v. Howard*, 39 Vt. 106). But dreams and revelations, or visions of a person in a mesmeric sleep are not necessities. *Id.*

¹ *Smith v. Allen*, 1 Lans. 9; *Gilman v. Andrus*, 28 Vt. 241

her conduct." Where, therefore, the goods have not been eloigned, but are in the house, with the knowledge and sanction of the husband, it is his duty to compel their redelivery to the tradesman, or to tender them back to him. (*e*) The mere circumstance, however, of the husband seeing the wife wearing some of the things ordered by her, and not objecting to them, will be no proof of his assent to the whole of an extravagant order.¹

175. *Of the giving of credit to married women, so as to exempt the husband from liability.*—Evidence that the wife has a separate income, over which the husband has no control; that she keeps a separate banking account of her own; and that the plaintiff has taken the wife's promissory notes, or has drawn bills of exchange on her which she has accepted in her own name, in payment of goods supplied to her, and which notes or bills have been paid, when at maturity, through her bankers—show that the plaintiff dealt exclusively with the wife, and gave credit to her, relying upon the funds known or presumed to be at her disposal, so as to exempt the husband from responsibility. (*f*) In these cases the remedy of the creditor is against the separate property of the wife in the hands of her trustees. (*g*) If the tradesman, at the time he deals with and trusts the wife, does not know her to be a married woman, he cannot be said to have given credit to the husband; and, if articles sold to the wife under such circumstances are not necessary for the use of the wife, and have not been used by the wife,

(*e*) *Waithman v. Wakefield*, 1 P. 643. *Taylor v. Brittan*, 1 C. & P. 16, n. *Metcalf v. Shaw*, 3 Campb. 22.

(*f*) *Bentley v. Griffin*, 5 Taunt. 350. *Freestone v. Butcher*, 9 C. & 34 L. J., Ex. 85.

¹ See *Reakert v. Sanford*, 5 Watts & S. 164; *Wilson v. Burr*, 25 Wend. 386.

with the knowledge of the husband, and have not been consumed in the husband's household, or come in any shape or way to his use, and he has not subsequently sanctioned or adopted the wife's contract, he cannot be made responsible for the payment of the price of them. (*h*)'

176. *Remedies of creditors against the separate property of married women.*—A married woman is not personally liable upon any contract made by her during coverture, whether she be living with, or separated from, her husband, and whether the latter be an alien resident abroad, or, being a subject, has abjured the realm and gone beyond sea, and she has represented to be, and has contracted as, a widow or a feme sole. (*i*) But if a married woman has the power of dealing with separate property of her own, she has the power of contracting debts to be paid out of it, and her separate property is bound by her debts, obligations, and engagements contracted with reference to and upon the faith or credit of that property; (*k*) and effect will be given to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied. (*l*) The manner of coming at the separate property of the wife has been by decree, to bind the trustees as to personal estate in their hands. (*m*) The court of chancery, for example, has decreed payment

(*h*) *Clifford v. Laton*, 1 M. & M. 102. *v. Hine*, L. R., 5 Ch. 276. London Chartered Bank of Australia *v. Lem-*

briere, L. R., 4 P. C. 572.

(*i*) *Stretton v. Busnach*, 1 Bing. N. C. 139. *Barden v. Keverberg*, 2 M. & W. 61. *Marsh v. Hutchinson*, 2 B. & P. 226. *Williamson v. Danes*, 9 Bing. 292.

(*k*) *Johnson v. Gallagher*, 3 De G. F. & J. 494; 30 L. J., Ch. 298. *Picard*

(*l*) *Owens v. Dickenson*, 1 Cr. & Ch. 54. *Johnson v. Gallagher*, 3 De G. F. & J. 494; 30 L. J., Ch. 306.

(*m*) *Hulme v. Tenant*, 1 Br. Ch. C. 19. *Heatley v. Thomas*, 15 Ves. 596.

' See *West v. Laraway*, 28 Mich. 464.

out of a wife's separate estate of promissory notes and bills of exchange made and accepted by the husband and wife jointly, or by the wife alone during the coverture; (*n*) also of the bills of her tradesmen and solicitors, (*o*) and of debts due for rent of houses taken by her on lease. (*p*) A married woman may also be placed upon the list of contributories to a company in respect of her separate estate; for if a married woman, having separate property, enters into a pecuniary engagement, whether by ordering goods or otherwise, which (if she were a feme sole) would constitute her a debtor, and in entering into such an engagement she purports to contract, not for her husband but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable, and the question whether the obligation was contracted in the manner mentioned must depend upon the facts and circumstances of each particular case. (*q*) If it appears that a bond or promissory note, or any security for money, or any acknowledgment of a debt has been obtained from a married woman by any undue influence on the part of the husband, the court would then decline to interfere to charge her separate estate; but the exercise of such undue influence must be clearly established to repel the *prima facie* liability. (*r*) The rule that a feme covert is to be considered a feme sole as to her separate property, does not

(*n*) *Bullpin v. Clarke*, 17 Ves. 365.

Stuart v. Kirkwall, 3 Mad. 387.

(*o*) *Murray v. Barlee*, 4 Sim. 82.

(*p*) *Gaston v. Frankum*, 13 Jur. 39.

(*q*) *Re Leeds Banking Co.*, *ex parte*

Matthewman L. R., 3 Eq. 781; 36 L. J., Ch. 90. *Bulter v. Cumpston*, L.

R., 7 Eq. 16; 38 L. J., Ch. 35. *Mc-*

Henry v. Davies, L. R., 10 Eq. 88; 39 L. J., Ch. 866.

(*r*) *Field v. Sowle*, 4 Russ. 112.

extend to transactions between herself and her husband. (s)¹

177. Proof of marriage.—If parties have lived together as man and wife, and are commonly reputed to be married, this suffices to enable third parties to charge them with the duties and responsibilities that result from such a relationship; (t) and if it be proved that they have actually gone through the marriage ceremony, but that they afterwards separated, there is sufficient evidence of their standing towards each other in the relationship of man and wife, unless a divorce can be proved. No contract entered into by a married woman with a person who knows her to be married, otherwise than by deed acknowledged, or by some act in court in which she is put at arm's length from her husband, can bind her real estate, even although she has for a long time led the other party to believe that she will abide by such contract, and he has, on the faith of such belief, irrevocably abandoned valuable rights. (u) A feme sole trader may, by the custom of London, be sued in the courts of the city of London upon contracts made by her in the course of her trade. (x)

178. Release of the husband from liability upon the wife's contracts after adultery.—Those who furnish the wife with the means of subsistence after a separation by reason of the wife's adultery have no claim against the husband in respect thereof, whether they had notice of the adultery or not, at the time they furnished their goods; for the implied authority of a

(s) *Milnes v. Busk*, 2 Ves. jun. 498.

(t) *Mace v. Cammel*, Loft. 782.
Edwards v. Farebrother, 2 M. & P. 893; 3 C. & P. 524.

(u) *Nicoll v. Jones*, 36 L. J., Ch. 554; L. R., 3 Eq. 696. *Lane v. Mc-*

Keen, 15 Maine, 304.

(x) *Beard v. Webb*, 2 B. & P. 61
Lewin on Trusts, 493-499

¹ See note 1, p. 261.

wife, who is not living with her husband, to bind her husband by her contracts for necessaries, is put an end to by her adultery. (*y*)¹ The previous adultery and misconduct of the husband form no excuse, in point of law, for the adultery of the wife. (*z*) But if a condonation takes place, (*a*) and the husband receives the wife back again, all her original rights are restored; and the husband cannot then refuse to support and maintain her, unless he can prove the commission of a fresh and subsequent act of adultery. (*b*)² And if the husband connives at the adultery of the wife, and continues to reside with her, or permits her to remain under his roof in charge of his children, he cannot refuse to maintain her. (*c*) If, however, during the husband's absence abroad, the wife places herself and her husband's children under the protection of a man with whom she resides and carries on an adulterous intercourse, without the knowledge of the husband, the husband is not responsible for things furnished to the children by the wife's order, if he has supplied her with money adequate for the maintenance of the children. (*d*)

179. *Desertion of the husband by the wife.*—If the wife leaves the husband without just cause, she cannot procure subsistence elsewhere, at his expense. If she has returned to a sense of duty, after a short absence, the husband would be bound to receive her back; and if he refused to do so, his liability for necessaries

(*y*) *Cooper v. Lloyd*, 6 C. B., N. S. 524.

(*a*) *Keats v. Keats*, 28 L. J., P. & M. 78.

(*z*) *Govier v. Hancock*, 6 T. R. 603.

(*b*) *Harris v. Morris*, 4 Esp. 41.

And see *Needham v. Bremner*, L.

(*c*) *Norton v. Faran*, 1 B. & P. 227

R., 1 C. P. 583; 35 L. J., C. P.

Robison v. Gosnold, 6 Mod. 172.

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(*d*) *Atkyns v. Pearce*, 2 C. B. N. S. 163.

¹ See *Quincy v. Quincy*, 10 N. H. 272; *Hall v. Hall*, 4 Id. 462.

² See *Rennick v. Ficklin*, 3 B. Mon. 166.

supplied to her would be revived from the time of such refusal. But if she has deserted her husband for a lengthened period, he is not bound to receive her back or maintain her; "for, if it were so, wives might leave their husbands' bed in the pride of their youth, and return in their useless old age." (e) If tradesmen, therefore, part with their goods to a wife living separate from her husband, and then seek to charge the husband with the payment of them, the burden of proving that the separation took place under such circumstances as will entitle them to recover the price from the latter, falls upon their shoulders. (f) "The mischief," observes Abbot, C. J., "of allowing the ordering of goods by a married woman, living apart from her husband, to be prima facie evidence, so as to charge him for them, would be incalculable." (g)

180. *Desertion of the wife by the husband.*—If the husband separates from his wife, and leaves her destitute, without being able to prove that she has forfeited her marriage rights by adultery, the law gives her a right to support herself upon the credit, and at the expense, of her husband; and any tradesman who, at her request, supplies her with necessaries suitable to her station in life, in contemplation of law, supplies them to the husband himself, and may recover the amount as a debt due to him from the latter. (h) And the wife may also pledge the husband's credit for necessaries for the maintenance of their children of tender years, living with her against his will, by the order of the court. (i) A person who advances, to a deserted wife, money to enable her to supply herself with neces-

(e) *Manby v. Scott*, 1 Lev. 5.

(h) *Harris v. Morris*, 4 Esp. 41.

(f) *Clifford v. Laton*, 3 C. & P. 16.
Edwards v. Towels, 6 Sc. N. R. 6; 1.

Bolton v. Prentice, 2 Str. 1214.

(g) *Mainway v. Leslie*, 1 M. & M.

(i) *Bazeley v. Forster*, L. R., 3 Q. B. 559; 37 L. J., C. B. 237.

saries, has an equitable claim against the husband for so much of the money as is actually applied, by the wife, in paying for necessaries; (*k*) but if the wife has separate income of her own, adequate to her support, the husband is not, then, bound to maintain her; (*l*) and if the husband offers to receive her back, and support her, and the wife refuses to return, her authority to support herself at his expense is at an end. (*m*) The authority, given by law, to a destitute wife to pledge the credit of her husband for her support, is not revoked by the husband becoming insane. (*n*) But the authority of a wife to pledge her husband's credit, is no greater in the case of a lunatic than where the husband is sane; and, therefore, if she has an income adequate to maintain her in her station in life, she cannot pledge the lunatic husband's credit. (*o*) The law does not, of course, sanction a wife in running into extravagance. "It makes her the husband's agent to order such things as are reasonable and necessary for herself; but it gives her no liberty to pledge his credit for anything beyond what is reasonably necessary." (*p*)¹

Where a wife, being violently turned out of doors and threatened by her husband, employed an attorney to exhibit articles of the peace against him, it was held that the husband was responsible for the payment of

(*k*) *Jenner v. Morris*, 3 De G., F. & J. 45; 30 L. J., Ch. 361. *Deare v. Soutton*, L. R., 9 Eq. 151. And see *Johnson v. Manning*, 12 Ir. C. L. Rep. 148.

(*l*) *Liddlow v. Wilmot*, 2 Stark. 86. *Johnston v. Sumner*, 3 H. & N. 266; 27 L. J., Ex. 341.

(*m*) *Flannagan v. Bishop Wearmouth*, 8 Ell. & Bl. 455.

(*n*) *Read v. Legard*, 6 Exch. 642.

(*o*) *Richardson v. Du Bois*, L. R., 5 Q. B. 51; 39 L. J. Q. B. 69.

(*p*) *Emmett v. Norton*, 8 C. & P. 510.

¹ As to the authority of the wife to effect insurances in the absence of the husband from home, see *O'Connor v. Hartford, &c. Ins. Co.* 31 Wis. 160.

the attorney's charges; (*q*) for, whenever the husband, by his conduct, compels the wife to appeal to the law for protection, she may charge him for the necessary expense of the proceedings, as much as for necessary food or raiment. (*r*)¹ But an indictment against the husband is not necessary for the protection of the wife; and, therefore, where a husband, having ill-treated his wife, was indicted on her prosecution, and fined and imprisoned, and a brother of the wife advanced money to pay the expenses of the prosecution, it was held that he was not entitled to recover the amount from the husband. (*s*) The husband is not liable for expenses incurred by the wife, without his sanction, in procuring a deed of separation, (*t*) nor for the costs of a suit instituted on her behalf for a judicial separation, where proper care has not been taken to ascertain that the suit was rightly instituted. (*u*) But a husband has been held liable for preliminary expenses incidental to a suit for restitution of conjugal rights, and for the expenses of obtaining counsel's opinion on the effect of an ante-nuptial agreement for a settlement, and of obtaining professional advice as to the proper mode of dealing with tradespeople who were pressing her for payment for necessities supplied by them to her since the desertion and of preventing a threatened distress for rent, (*x*) and for the costs necessarily incurred by the wife in

(*q*) *Turner v. Rooks*, 10 Ad. & E. 47. *Shepheld v. Mackoul*, 3 Campb. 327. Ala. 227. *Williams v. Monroe*, 18 B. More, 514. *Johnson v. Williams*, 3 Iowa, 197.

(*r*) *Brown v. Ackroyd*, 5 Ell. & Bl. 826. (*u*) *Hooper*, in re, 33 L. J., Ch. 305. 2 De G., J. & S. 91. And see *Shelton v. Pendleton*, 18 Conn. 417.

(*s*) *Grindell v. Godmond*, 5 Ad. & E. 755. (*x*) *Wilson v. Ford*, L. R., 3 Ex.

(*t*) *Ladd v. Lyn*, 2 M. & W. 265. 63; 37 L. J., Ex. 60. And see *Pearson v. Darrington*, 32

¹ See *Warner v. Heiden*, 28 Wis. 517.

filing a petition for a judicial separation, although the petition was not proceeded with, and although the course prescribed by the practice of the divorce court, for obtaining the wife's costs, was not pursued. (*y*)

181. *What amounts to an expulsion of the wife by the husband.*—If, by cruelty, the husband renders it morally impossible for the wife to continue to reside with him, and she accordingly leaves him, this is as much an expulsion as if he had turned her out by main force. (*z*) If the husband brings home a loose woman, and treats her as a member of his family, this is a sufficient cause for the wife's leaving him; and so is the existence and continuance of an adulterous intercourse, on the part of the husband, with another woman. (*a*) Whenever the wife has once left her husband, under justifiable circumstances, she is not bound to return upon the invitation of the latter; and the husband's liability for necessities furnished to her cannot be determined by a request, on his part, that she will again return to his protection. (*b*)

182. *Liability of the husband for necessities supplied to the wife during a separation by mutual consent.*—The husband is responsible for necessities furnished to the wife during the continuance of a separation by mutual consent, unless she has competent provision from him, or from funds at her own disposal, if she has such a provision, it lies on the husband to show it, (*c*) and on the creditor to prove that it is insufficient. (*d*) If the wife leaves her home in consequence of a quarrel with the husband, in which

(*y*) *Rice v. Shepherd*, 12 C. B., N. S. 322.

(*z*) *Baker v. Sampson*, 14 C. B. N. S. 383. *Blowers v. Sturtevant*, 4 Denis, 46.

(*a*) *Houlston v. Smyth*, 3 Bing. 127.

(*b*) *Emery v. Emery*, 1 Y. & J. 505, 506.

(*c*) *Dixon v. Hurrell*, 8 C. & P. 719.

(*d*) *Johnston v. Sumner*, *ante*, p. 276.

they are mutually to blame, and obtains lodging and the necessaries of life at the hands of a third party, the husband will be responsible for the board and lodging and necessaries provided for her. (*e*) Where a wife voluntarily left her husband's house, and went to reside with her brother, about a mile distant, with whom she continued to live apart from her husband until her death, many years after, when her brother, without any communication with the husband, buried her in a suitable manner, it was held that the brother was entitled to recover from the husband the expenses of the funeral. (*f*) But in all cases of voluntary separation, unaccompanied by cruelty, the husband may put an end to his liability for necessaries by requiring the wife to return to him, and prohibiting parties from continuing to give her credit; (*g*) and his liability is, in all cases, dependent upon the pecuniary means at the wife's disposal. (*h*) A mere covenant or agreement to make an allowance for the wife's maintenance will not, of itself, exonerate the husband from his liability. He must show that the covenant has been fulfilled, and that the allowance has been regularly paid; and that it is sufficient, or has been accepted by the wife as sufficient, for her suitable support. (*i*)¹ Where a husband consents to his wife living apart from him on the terms that she shall accept an allowance, which is paid, she has no authority to pledge his

(*e*) *Reed v. Moore*, 5 C. & P. 200.

(*f*) *Bradshaw v. Beard*, 12 C. B., N. S. 344; 31 L. J., C. P. 273.

(*g*) *Hindley v. Westmeath*, 6 B. & C. 200.

(*h*) *Mizen v. Pick*, 3 M. & W. 481.

Tod v. Stokes, 12 Mod. 245. As to the liability of a lunatic husband, see *ante*, p. 277, and post, p. 288.

(*i*) *Nurse v. Craig*, 2 B. & P. N. R. 148. *Burrett v. Booty* 3 Taunt.

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¹ See *Cany v. Patton*, 2 Ashm. 140; *Baker v. Barney*, 8 Johns. 72; *Litson v. Brown*, 26 Ind. 489; *Boardman v. Silver*, 100 Mass. 330.

credit, although the allowance is inadequate. (*k*) If the husband, from any of the preceding causes, is absolutely discharged from his obligation to maintain the wife, the latter does not, in consequence thereof, acquire any power or capacity of contracting on her own account, so as to incur any liability upon her contracts. She herself remains exempt, by reason of the coverture, from all personal responsibility *ex contractu*; though he who trusts her may, in general, if she has property settled to her separate use, take proceedings to make that property available for the satisfaction of her debts. (*l*)¹

183. *Effect of a decree for a judicial separation.*—By the divorce act, 20 & 21 Vict., c. 85, s. 26, it is enacted that, in every case of a judicial separation, the wife shall, whilst so separated, be considered as a feme sole, for the purposes of contracting and suing and being sued, and her husband shall not be liable in respect of any engagement or contract she may have entered into, or, for any costs she may incur as plaintiff or defendant; but, where, upon any judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same has not been duly paid by the husband, he is then liable for necessities supplied for the wife's use. (*m*) By the 21 & 22 Vict. c. 108, s. 8, no discharge, variation, or reversal of any decree for a judicial separation is to prejudice or affect any rights or remedies which any person would otherwise have had in respect of any debts, contracts or acts of the wife incurred, entered into, or done, between

(*k*) *Biffin v. Bignell*, 7 H. & N. 877; J., Ch. 298. *M'Henry v. Davies*, L. 31 L. J., Ex. 189. R., 10 Eq. 88.

(*l*) *Ante*, v. 131. *Murray v. Barlee*, (*m*) *Hunt v. De Blaquiére*, 5 Bing. 3 M. & K. 220. And see *Johnson v. Gallagher*, 3 De G., F. & J. 494; 30 L.

¹ *Ib.*; *Cany v. Patton*, 2 Ashm. 140.

the making of the decree and the discharge, variation, or reversal thereof.

184. *Orders for the protection of the property and earnings of a deserted wife* place the wife during the continuance of the order and the desertion in the like position in all respects with regard to property and contracts, and suing and being sued, as if she had obtained a decree for a judicial separation. (*n*) Such orders are, however, confined to money or property acquired by lawful industry, and do not extend to property acquired by keeping a brothel. (*o*)

185. *Transportation of the husband for a term of years* operates as a suspension of the civil and marital rights of the husband during the continuance of the term of banishment, (*p*) and until he has actually returned to this country after the expiration of his sentence. (*q*) He is not, when the exile is a mere temporary exile, civilly dead; (*r*) but the effect, as regards the capacity of the wife to contract and to be sued as a feme sole, is precisely the same as if he were so. But a voluntary absence beyond the sea, on the part of the husband, or a compulsory absence in the service of the state, does not in anywise alter or affect the legal position of the wife. If the husband has been banished for the term of his natural life, he is civilly dead, and the wife is then remitted to the position of a feme sole. (*s*)¹ If the husband is an alien enemy, he has no legal existence in this country; and so long as he remains in that position, his wife resident

(*n*) 20 & 21 Vict. c. 85, s. 21. 21 & 22 Vict. c. 108, ss. 6-9. Mid. Rail. Co. v. Pye, 10 C. B., N. S. 179; 30 L. J., C. P., 314.

(*o*) *Mason v. Mitchell*, 3 H. & C. 528; 34 L. J., Ex. 68.

(*p*) *Ex parte Franks*, 1 M. & Sc. 11

(*q*) *Carroll v. Blencow*, 4 Esp. 28.

(*r*) Co. Litt. 133 a.

(*s*) Co. Litt. 133 a. *Countess of Portland v. Prodgers*, 2 Vern. 104. *Ex parte Franks*, 1 M. & Sc. 11.

¹ Story on Cont. § 146.

here is looked upon as a feme sole; and she is, consequently, liable to be sued upon all contracts entered into by her, just the same as if she were a widow. (t) But if he is an alien ami, his wife is in the same plight as any other married woman.

186. *Death of the husband.*—The death of the husband does not render the wife responsible upon any contracts made by her during coverture; nor is she responsible upon any promise, made after the death of the husband, to pay for things furnished her in his lifetime, as such a promise is without consideration. (u) Contracts entered into by the wife after the death of the husband, but before it was known, are not binding on her. (x)

187. *Liabilities resulting from reputed marriages.*—"If a man," observes Lord Kenyon, "has permitted a woman, to whom he was not married, to use his name, and pass for his wife, and, in that character, to contract debts, he is liable for her debts, whether the tradesman who furnished the goods knew the circumstance to be so or not. But this must not be taken to apply to the case of a common strumpet, who may assume the name of a person without his authority, from having casually known him; it must be where the man permits the woman to assume his name, where she lives in his house, and is part of his family." (y) And it matters not whether the man so acting, is a married man or a single man. If he lives with the woman, and gives her every appearance of being his wife, the proof of a previous marriage with some other woman cannot exonerate him from liabil

(t) *Derry v. Duchess of Mazarine*, 1 Raym. 147.

(u) *Meyer v. Haworth*, 8 Ad. & E. 467. See *Ecker v. Lafferty's Admr.*, 3 Pitts. (Pa.) 500.

(x) *Smout v. Ilberry*, 10 M. & W. 1. *Blades v. Free*, 9 B. & C. 167. Poth. Obl. No. 81

(y) *Watson v. Threlkeld*, 2 Esp. 637

ity. (2) Having once held out the woman as his wife, the reputed husband is bound, when the connection ceases, to make the termination of it notorious, in order to escape from the difficulties of his position. (a)¹

188. *Contracts with bankrupts.*—For the protection of persons having bona fide dealings with a bankrupt, after the act of bankruptcy, but without notice of it, it is enacted by the bankruptcy act of 1869 that nothing in that act shall render invalid any contract or dealing with any bankrupt made in good faith and for valuable consideration before the date of the order of adjudication, by a person not having, at the time of making such contract or dealing, notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication. (b) The act also provides that, subject and without prejudice to the provisions of the act relating to the proceeds of the sale and seizure of goods of a trader, and to the provisions avoiding certain settlements, and avoiding, on the ground of their constituting fraudulent preferences, certain conveyances, charges, payments, and judicial proceedings, the following transactions by and in relation to the property of a bankrupt shall be valid, notwithstanding any prior act of bankruptcy:—Any disposition or contract with respect to the disposition of property by conveyance, transfer, charge, delivery of goods, payment of money, or otherwise, howsoever made, by any bankrupt in good faith, and for valuable consideration before the date of the order of adjudication, with any person not having at the time of the making of such

(a) *Robinson v. Nahon*, 1 Campb. 245.

(a) *Ryan v. Sams*, 17 L. J., Q. B. 271; 12 Q. B. 460.

(b) 32 & 33 Vict. c. 71, s. 94.

¹ Story on Cont. § 168.

disposition of property notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication. (c)

189. *Liabilities of trustees in bankruptcy.*—If the trustees of a bankrupt permit the bankrupt to carry on his trade for the benefit of the estate, they will be responsible for the payment of the price of goods ordered and used by him in the exercise of such trade. (d) But one trustee is not responsible, at common law for things ordered, or work done by one of his colleagues without his knowledge, sanction, or authority.

190. *Contribution between trustees in bankruptcy.*—If, in the course of the administration of the estate, the trustees enter into joint contracts, and incur a joint liability thereon, and one alone is compelled to pay the whole amount due on such contracts, he has a right to an action for contribution against his co-trustee, whether the latter has or has not in his hands any funds from the bankrupt's estate. (e)

191. *Contracts with drunkards.*—A party who makes a contract in such a state of drunkenness as not to know what he is doing, cannot be compelled to perform that contract, by the other party who knew him to be in that state. A man who takes an obligation from another so circumstanced, is guilty of actual fraud. Therefore, where an action was brought upon a bill of exchange by the indorsee against the indorser, and the defendant pleaded that, at the time he indorsed the bill, he was so drunk as to be unable to comprehend the meaning or effect of the indorsement, or to contract thereby, of which the plaintiff at the

(c) Sect. 95.

(d) *Kinder v. Howarth*, 2 Stark. 354.

(e) *Hart v. Biggs*, Holt, 245. *Bevan*

v. Whitmore, 15 C. B., N. S. 433 763.

time of the indorsement had notice, it was held that the plea was a good answer to the action. (*f*) But a contract made by a man in a state of drunkenness is voidable only and not void; and, therefore, the drunken man may, if he pleases, ratify it after he becomes sober, and it will then be binding upon him. (*g*) It has been said that a bill of exchange or a promissory note, indorsed or accepted or made by a person in a complete state of intoxication, cannot be enforced, as against the drunkard, by a bona fide holder who received and gave value for it on the credit of the acceptance or indorsement, or signature, in ignorance of the drunkenness and of the fraudulent circumstances under which the instrument was obtained; (*h*) but this seems very doubtful, and it is clearly otherwise if the party was only partially intoxicated at the time he accepted or indorsed the instrument. (*i*)¹

(*f*) *Gore v. Gibson*, 13 M. & W. 623; 14 L. J., Ex. 152. *Cole v. Robins*, Bull. N. P. 172 a. *Pett v. Smith*, 3 Campb. 33. *Fenton v. Holloway*, 1 Stark. 126. *Hamilton v. Grainger*, 5 H. & N. 4 Poth. OBLIGATIONS No 49. (*g*) *Matthews v. Baxter*, L. R., 8 Ex. 132. (*h*) *Sentence v. Poole*, 3 C. & P. 1. (*i*) *Shaw v. Thackray*, 17 Jur. 1045.

¹ See *State Bank v. McCoy*, 69 Pa. St. 204; *McCritlis v. Bartlett*, 8 N. H. 569; *Richardson v. Strong*, 13 Ired. 106; *Drummond v. Hopper*, 4 Harr. 327; *Prentice v. Achorn*, 2 Paige, 30; *Seymour v. De Lancey*, 3 Cow. 445; *Wigglesworth v. Steers*, 1 Hen. & M. 70; *Jenners v. Howard*, 6 Blackf. 240; *Belcher v. Belcher*, 10 Yerg. 121; *Pittinger v. Pittinger*, 2 Greenl. Ch. 156; *French v. French*, 8 Ohio, 214; *Cummings v. Henry*, 10 Ind. 109; *Caulkins v. Fry*, 35 Conn. 170; *Fitzgerald v. Reed*, 9 Sm. & M. 94; *Barrett v. Buxton*, 2 Aik. (Vt.) 167; *King's Ex'rs v. Bryant's Ex'rs*, 2 Hay. (N. C.) 394; *Taylor v. Patrick*, 1 Bibb, 168; *Reinicker v. Smith*, 2 Har. & J. 423; *Arnold v. Hickman*, 6 Munf. 15; *Williams v. Mabuct*, 1 Bailey, 343; *Reynolds v. Waller's Heir*, 1 Wash. 164; *Dorr v. Munsel*, 13 Johns. 430; *Seymour v. De Lancey*, 3 Cow. 445; *Drummond v. Hopper*, 4 Harr. 327; *Owning's Case*, 1 Bland. 371. But the drunkenness must be

192. *Contracts with lunatics.*—If a party to a contract was, at the time he entered into the engagement, a lunatic or of unsound mind,¹ and any imposition appears to have been practiced upon him, or any advantage taken of his infirmity by the other contracting parties, the contract will be void, as having been procured by fraud; but if the contract is a fair and honest contract, and bears no symptoms of the infirmity of mind of the party sought to be charged thereon, the courts will enforce it like any other contracts. (*k*) A lunatic, however, will not be bound by any deed entered into by him, (*l*) unless it be shown that it was entered into during a lucid interval; and, if it be a necessary and beneficial contract for him to enter into, such as a lease of his lands at an advantageous rent, the nature of the contract may be prima facie evidence of its having been made during a lucid interval. (*m*)² An action for the price of goods sold and delivered, or of work done, or for the hire of horses, carriages, or servants, cannot be defeated by showing that the defendant had been found by inquisition to be a lunatic at the time he received the goods, or had the benefit of the work, or the use of

(*k*) *Mamby v. Bewicke*, 3 K. & J. Abr. (LUNATIC). *Beverley's case*, 4 Co. 123, b.

(*l*) *Yates v. Boen*, 2 Str. 1104. (*m*) *Sergeson v. Sealey*, 2 Atk. 413. *Thompson v. Leech*, 3 Salk. 301. Vin. *Faulder v. Silk*, 3 Campb. 126. *Creagh v. Blood*, 2 Jones & Lat. 509.

total. *Mitchell v. Kingman*, 5 Pick. 431; *Webster v. Woodford*, 3 Day. 90; *Seaver v. Phelps*, 11 Pick. 304; *Rice v. Peet*, 16 Johns. 503; *Wilson v. Bigger*, 7 Watts & S. 111; *Burroughs v. Richman*, 1 Greenl. (N. J.) 233.

¹ Every person may be deemed of unsound mind who has lost his memory and understanding by old age, sickness, or other accident, so as to render him incapable of transacting business, or of managing his property. *Young v. Stevens*, 48 N. H. 135; *Dennett v. Dennett*, 44 Id. 531.

² See *Staples v. Wellington*, 58 Me. 454.

the horses, carriages, and servants; (*n*) for the law will not permit the lunatic's infirmity to be made an instrument of fraud upon third parties who have dealt with him in good faith. (*o*) If a lunatic, apparently of sound mind, and not known to be otherwise, enters into a fair and bona fide contract, such contract cannot afterwards be set aside. Therefore, where a lunatic purchased of an assurance company two annuities for his life, and paid down the purchase-money, the company having at the time no knowledge of his lunacy, it was held that the contract could not be avoided. (*p*)¹ And, where a lunatic contracted for the purchase of an estate and paid down a deposit, and the vendor treated fairly and in good faith, and in ignorance of the infirmity of the lunatic, it was held that the deposit could not be recovered back. (*q*) Although contracts by lunatics cannot be carried into execution against them, yet, if they were of sound mind when the contract was made, and the imbecility of intellect has subsequently intervened, the rights of the parties will not be altered. (*r*) The lunacy of a husband is no answer to an action brought against him upon the ordinary implied contract in respect of necessities furnished to his wife. (*s*) But the authority of a wife to pledge her husband's credit is not greater, in the case of a lunatic husband, than in the

(*n*) *Brown v. Jodrell*, 3 C. & P. 30; (*q*) *Beaven v. M'Donnell*, 9 Exch. M. & M. 105. *Niell v. Morley*, 9 309; 23 L. J., Ex. 94
Vea, 478. *Dane v. Kirkwall*, 8 C. & (*r*) *Ld. Eldon, Owen v. Davies*, 1 P. 679. *Bagster v. Earl of Portsmouth*, 7 D. & R. 614; 5 B. & C. 170. Ves. sen. 82. *Hall v. Warren*, 9 Ves. 605.
(*o*) *Nelson v. Duncombe*, 9 Beav. (*s*) *Reed v. Legard*, 20 L. J., Ex. 211; 15 L. J., Ch. 296. 309; 6 Exch. 656. *Davidson v. Molton v. Camroux*, 4 Exch. Wood, 1 De G., J. & S. 465; 32 L. 17; 18 L. J., Ex. 68, 358. J., Ch. 400.

¹ See *Staples v. Wellington*, 58 Me. 454; and cases cited in note 2.

ordinary case of husband and wife. (t) Equity will raise an implied contract, and enforce a demand against the lunatic, or his estate, for moneys expended for the necessary protection of his person or estate. (u)¹

193. *Contracts with alien friends.*—Every subject of a friendly state, resident in this country, has the same power of entering into and enforcing personal contracts as the natural-born subjects of the realm. (x)² Formerly an alien could not purchase or hold any estate of freehold or inheritance in lands or tenements, because such an interest in the soil was supposed to require a permanent allegiance; and he could not,

(t) *Richardson v. Du Bois*, L. R., 5 Q. B. 51; 39 L. J., Q. B. 69.

(x) Com. Dig. ALIEN, c. 5. *Openheimer v. Levy*, 2 Str. 1082.

(u) *Williams v. Wentworth*, 5 Bv. 325.

¹ And see, generally, as to insane persons, and their contract, *Allen v. Berryhill*, 27 Iowa, 534; *Behrens v. McKenzie*, 23 Id. 333; *Baldwin v. Dunton*, 40 Ill. 188; *Furnam v. Brooks*, 9 Pick. 212; *Grant v. Thompson*, 4 Conn. 208; *Clearwater v. Kimler*, 43 Ill. 272; *Sheldon v. Harding*, 44 Id. 68; *Emery v. Hoyt*, 46 Id. 258; *Wyatt v. Walker*, 44 Id. 258; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236; *Wait v. Maxwell*, 5 Pick. 217; *Mitchell v. Kingman*, Id. 431; *Seaver v. Phelps*, 11 Id. 304; *Rice v. Peet*, 15 Johns. 503; *Fitzgerald v. Reed*, 7 Sm. & M. 94; *Young v. Stevens*, 49 N. H. 133; *Fitzhugh v. Wilcox*, 12 Barb. 235; *Loomis v. Spencer*, 2 Paige, 158; *Beals v. See*, 10 Barr, 60; *Arnold v. Richmond, &c. Works*, 1 Gray, 434; *Gibson v. Soper*, 6 Id. 279; *Ollis v. Billings*, 6 Miss. 416; *Shaw v. Thompson*, 16 Pick. 196; *Van Deusen v. Sweet*, 57 N. Y. 378; *Canfield v. Fairbanks*, 63 Barb. 461; *Dexter v. Hall*, 15 Wall. 9; *Lozear v. Shields*, 23 N. J. Eq. 509; *Motley v. Head*, 43 Wt. 633; *Wilder v. Weakley*, 34 Md. 181; *Bird v. Bird*, 21 Gratt. 712; *Elwyn's Appeal*, 67 Pa. St. 367; *Re Eckstein*, 1 Pa. Law Journ. R. 224. As to liability for necessities, see *Bird v. Bird*, 21 Gratt. (Va.) 712; *Salter v. Salter*, 6 Bush. (Ky.) 624; *Sawyer v. Lufkin*, 56 Me. 308.

² One born in a foreign country, of foreign parents, and not naturalized, is an alien in the United States (*Jackson v. Wright*, 4 Johns. 75; *Ainslie v. Martin*, 9 Mass. 456). And as to who are and who are not, see *Crane v. Reeder*, 25 Mich. 303.

therefore, lawfully enter into or enforce any contracts connected with the acquisition and enjoyment of freehold estates. (y) By the 7 & 8 Vict., c. 66, s. 4, every alien, being the subject of a friendly state, might take and hold every species of personal property whatever, except chattels real, by purchase, gift, representation, or otherwise, as if he were a natural-born subject; and every alien friend residing in this country might, by grant, lease, demise, assignment, or otherwise, take and hold any lands, houses, or other tenements, for the purpose of residence or occupation, or for the purpose of any business, trade, or manufacture, for any term of years not exceeding twenty-one years. (z) And now, by the 33 Vict., c. 14, real and personal property of every description may be taken, acquired, held, and disposed of, by an alien in the same manner, in all respects, as by a natural-born British subject.¹ But nothing in that act is to qualify an alien to be the owner of a British ship. (a)² If, after a contract has been made with an alien friend, a war breaks out between his country and this, his right of action on

(y) Calvin's case, 7 Co. 23, a. Co. (z) The statute 32 Hen. 8, c. 16, s. Litt. 2 b. 1 Woodd. lect. ALIENS. 13 is virtually repealed. Roll. Abr. 194. (a) Sect. 14.

¹ As to the rules as to holding lands in certain states, see *State v. Killian*, 51 Mo. 80; *McCarty v. Perry*, 1 Lans. (N. Y.) 236; *Goodrich v. Russel*, 42 N. Y. 177; *People v. Snyder*, 41 Id. 397; *Seltegest v. Scrimp*, 35 Tex. 328. As to their rights to sue, see *Elgee v. Lovell*, 1 Woolw. (Neb.) 102, 110; *Brown v. United States*, 5 Ct. of Cl. 571; *Lobsiger v. United States*, Id. 687. As to their capacity to hold office, see *State v. Murray*, 28 Wis. 96. And as to their allegiance, see *Carlisle v. United States*, 16 Wall. 147.

² An alien can not, under the laws of the United States governing the registry of vessels, be deemed master of a vessel, even for the purpose of defeating his claim to a lien for wages *The Dubuque*, 2 Abb. (U. S.) 20.

the contract is suspended until the return of peace. (*b*) The crown may, indeed, if it thinks fit, lay hands on all his debts and choses in action, and prevent him from afterwards putting them in suit; but, if it does not think fit so to do, his rights are restored on the return of peace. (*c*)

194. *Contracts with alien enemies.*—All alien enemies, and all British subjects, and subjects of neutral nations domiciled in any enemy's territory, or engaged in the service of a hostile power, (*d*) are disabled from contracting with British subjects unless they have obtained a license to trade. But they may lawfully provide for the wants and necessities of Englishmen detained abroad, and may enforce contracts made for such purposes, on the return of peace. (*e*) So long as hostilities last, they are utterly disabled from suing in our courts of justice, although they may be sued if they reside within their jurisdiction. In one case it was held that a natural-born subject might sue, in trust, for an alien enemy; (*f*) but this decision seems to be at variance with numerous authorities. (*g*) If a subject of a state at war with this country resides here, with the license and permission of the crown he has the same rights and privileges as an alien friend. (*h*) But the mere fact of the residence of a party in this country, without disturbance or interrup-

(*b*) *Flindt v. Waters*, 15 East, 260. Co. Litt. 129 b. Boussmaker, ex parte, 13 Ves. 71.

(*c*) 1 Rolle Abr. ALIEN, B. pl. Bro. DENIZEN, pl. 16, 20.

(*d*) *Roberts v. Hardy*, 3 M. & S. 534. *M'Connell v. Hector*, 3 B. & P. 113. *O'Mealy v. Wilson*, 1 Campb. 482. *The Ocean*, 5 Rob. 90.

(*e*) *Antoine v. Morshead*, 6 Taunt. 237. *Duhammel v. Pickering*, 2 Stark. 92.

(*f*) *Daubuz v. Morshead*, 6 Taunt. 332.

(*g*) *Brandon v. Nesbitt*, 6 T. R. 23. *Bristow v. Towers*, Id. 35. *Brandon v. Curling*, 4 East, 413. *Warin v. Scott*, 4 Taunt. 605. *Albretch v. Fussman*, 2 Ves. & B. 323. *Willison v. Patteson*, 7 Taunt. 447. *Kensington v. Inglis*, 8 East, 288.

(*h*) *Wells v. Williams*, 1 Ld. Raym. 282; 1 Salk 46. *Casseres v. Beil*, 8 T. R. 166. Vin. Abr. ALIEN (I). pl. 8

tion, is not evidence of a license from the crown, unless it be shown that the government was cognizant of his being here, and sanctioned his stay. (i)¹

(2) *Boulton v. Dobree*, 2 Campb. 162. *Alciator v. Smith*, 3 Campb. 244.

¹ See, as to the principles governing transactions with enemies, in the United States, *Hall v. Wall*, 22 Gratt. 424; *Mix v. United States*, 6 Ct. of Cl. 410; *Hill v. Baker*, 32 Iowa, 392; *Stoddart v. United States*, 6 Ct. of Cl. 340; *Cramer v. United States*, Id. 381; *Phillips v. Hatch*, 1 Dill, 571; *Dillon v. Court of Claims*, 5 Ct. of Cl. 586; *Mansfield v. McLearn*, 22 La. Ann. 216; *Wright v. Graham*, 4 Wa. Va. 430; *Howyer v. Siebert*, Id. 586; *Shotwell v. Ellis*, 42 Miss. 439; *Minis v. Armstrong*, Id. 429; *Webster v. Mahoney*, 22 La. Ann. 593; *Furman v. United States*, 5 Ct. of Cl. 579; *Faulkner v. United States*, Id. 612; *Bernheimer v. Same*, Id. 549; *Montgomery v. United States*, Id. 648; *Howell v. Gordon*, 40 Ga. 302; *Conley v. Burson*, 1 Heisk. 145; *Coleman v. Mollere*, 22 La. Ann. 106; *Sands v. New York, &c. Ins. Co.* 42 N. Y. 556; *Robinson v. International, &c. Ass. Soc.* 42 Id. 54; *Woods v. Wilder*, 43 Id. 164; *Haggard v. Conkright*, 7 Bush. (Ky.) 16; *Harden v. Boyce*, 59 Barb. 425; *Folsom's Case*, 4 Ct. of Cl. 366; *McKee v. United States*, 8 Wall. 163; *United States v. Grossmeyer*, 9 Wall. 72; *Butler v. Mapes*, Id. 766; *Hughes v. Oaks*, 59 Pa. St. 32; *Kershaw v. Kelsey*, 100 Mass. 561; *Billgerry v. Branch*, 19 Gratt. 393; *Barrell v. Hanrich*, 42 Ala. 60; *Ran v. Boyle*, 5 Bush. (Ky.) 253; *Ledoux v. Butler*, 21 La. Ann. 130; *Leake v. Richmond County*, 64 N. C. 132; *Setzer v. Catawba County*, Id. 516; *Smitherman v. Sanders*, Id. 522; *Critcher v. Holloway*, Id. 526; *Kingsbury v. Gooch*, Id. 528; *Shepherd v. Reese*, 42 Ala. 329; *Bank of West Tennessee v. Citizens' Bank*, 21 La. Ann. 18; *Williams v. Gay*, Id. 110; *Haney v. Manning*, Id. 166; *Pratt v. Draughon*, Id. 194; *McWilliams v. Bryan*, Id. 211; *Milard v. Rogay*, Id. 259; *Foster v. Bank of New Orleans*, Id. 338; *Owerby v. Owerby*, Id. 493; *Tanneret v. Marshall*, Id. 619; *Heidenreich v. Leonard*, Id. 628; *Eastin v. Duerest*, Id. 659; *Fournet v. Beer*, Id. 658; *Cousin v. Abat*, Id. 705; *Patton v. Gilmer*, 42 Ala. 548; *Billgerry v. Branch*, 19 Gratt. 393; *Noblom v. Milborne*, 21 La. Ann. 641; *Same v. Swords*, Id. 647. As to the right of alien enemies to sue or be sued, see *Zacharie v. Godfrey*, 50 Ill. 186; *Edmonston v. Union Bank*, 33 Ga. 91; *Dorsey v. Dorsey*, 30 Md. 522; *Same v. Kyle*, Id. 512; *Knoefel v. Williams*, 30 Ind. 1; *Semmes v. City, &c. Ins. Co.* 6 Blatchf. 445; *Herbert v. Rowles*, 30 Md. 271; *Ka-*

195. *Prisoners at war*, remaining in the realm under the protection of the crown, may enter into and enforce personal contracts, unless the crown interferes to prevent them. They may sue for the wages of labor, or for the price of goods sold and delivered; and they appear to have the same civil rights and privileges as alien friends. (*k*)

196. *Disabilities of convicts*.—When a person has been convicted of treason or felony, and has been sentenced to death or penal servitude, he is precluded by the 33 & 34 Vict., c. 23, from alienating or charging any property, or making any contract. (*l*) The convict may, however, make contracts when he is lawfully at large under any license, and may sue in respect thereof. (*m*) And his disability ceases altogether when he has suffered his punishment or received a pardon. (*n*)

The administrator of a convict's property, appointed in the manner prescribed by the act, (*o*) may let, mortgage, sell, convey, or transfer any part of such property at his discretion; (*p*) and all such contracts, bona fide made by the administrator under the powers of the act will be binding on the convict, and on all

(*k*) *Sparenburgh v. Bannatyne*, 1 B. & P. 170. *Maria v. Hall*, 2 B. & P. 236; 1 Taunt. 33, n.
(*l*) Sect. 8.

(*m*) Sect. 30.
(*n*) Sect. 7.
(*o*) Sect. 9.
(*p*) Sect. 12.

nawha Coal Co. v. Kanawha, &c. Co. 7 Blatch. 391; *Mixer v. Sibley*, 53 Ill. 61; *Blackwell v. Willard*, 65 N. C. 555; *Semmes v. City, &c. Ins. Co.* 36 Conn. 543; *Spencer v. Brower*, 32 Tex. 663; *Peerce v. Carskadon*, 4 W. Va. 234; *Louisville, &c. R. R. v. Buckner*, 8 Bush. (Ky.) 277; *Brooke v. Filer*, 35 Ind. 402; *Chappelle v. Olney*, 1 Sawyer, 401; *Dorsey v. Thompson*, 37 Mo. 25. The present naturalization laws of the United States are comprised in the Revised Statutes of the U. S. §§ 2165-2174, Revision of 1873-74.

persons claiming an interest in the property by virtue of that act. (q)

197. *Disabilities of outlaws.*—When a person has been outlawed, he is civilly dead, and is incapable of enforcing any contract he may have entered into, (r) although he is liable to be sued thereon. (s)

An attainted man, although civilly dead for some purposes, is nevertheless capable of contracting in a foreign country a marriage which will be deemed valid in England, if it was valid by the law of that country. (t)

The incompetency to contract and sue may be removed by means of a reversal of the outlawry.

198. *Parties privileged from actions and suits.*—A foreign sovereign cannot be sued in the courts of this country, unless he appears and consents to the action; (u) and the same privilege is extended to the ambassadors and ministers of foreign reigning sovereigns, their secretaries, and domestic servants. (x)

(q) Sect. 17.

(r) Hawk. P. C. lib. 2, c. 49, s. 9.

(s) Macdonald v. Ramsey, Foster, 61.

(t) Kynnaid v. Leslie, L. R., 1 C. P. 389; 35 L. J., C. P. 226.

(u) Brunswick (Duke of) v. King of Hanover, 6 Beav. 1.

(x) 7 Anne, c. 12. Magdalenia Nav. Co. v. Martin, 2 Ell. & Ell. 94; 28 L. J., Q. B. 310. Taylor v. Best, 14 C. B. 487. Barbrat's case, Cas. temp. Talbot, 281.

SECTION III.

OF THE AUTHENTICATION OF CONTRACTS.

199. Of the legal authentication of contracts.—

In most countries, and under most systems of jurisprudence, certain forms and solemnities have been established, for the purpose of binding men finally and conclusively to the truth and good faith of their acts and representations, and for the due authentication of contracts. The highest and most authentic contract known to the civil law, was called a stipulation; it was entered into before a magistrate or public officer, through the medium of interrogatories and answers calculated to explain the nature and extent of the undertaking, to put the parties entering into it on their guard, and to show it to be their mature and deliberate act. (y) A solemn contract of this nature could not afterwards be impeached, except on the ground of fraud or deceit, and could not, by the civil law, be released or discharged whilst executory, except by an equally solemn proceeding, conducted by question and answer before the magistrate or public functionary, called an acceptilation. (z) The civil law

(y) "Nimirum leges Romanæ ex nuda conventionē neminem obligari voluerunt, ne quaecumque promissum, et sermo, sæpe inconsultus magis quam ex voluntate proficiens, necessitate juris promittentem illigaret, et litium quoque, ut opinor, præcedendarum causa; sed excogitata est conventio certo modo et forma concipiendæ celebrandaque, quam deliberati animi cer-

tum signum esse voluerunt, et ex qua certo jure actio competere, quam conventionem STIPULATIONEM dixerunt." Vinnius, lib. 3, tit. 16, p. 677. "STIPULATIONIS introducendæ ratio hæc una fuit, ut discerni posset, an promissio temere effusa an vero consulto concepta esset." Perezii prælect. 2 p. 71.

(z) Vin. p. 677 Dig. lib. 45, tit. 1

did not consider the circumstance of the contract or undertaking being put into writing equivalent to the *verba solemnia* or stipulation. The written promise, or acknowledgment, or note, amounted only to evidence of the fact or transaction, and might be avoided and rendered nugatory by extrinsic testimony; but, if the acknowledgment was made in the prescribed form before the public functionaries, it was at once conclusive, and no exception could afterwards be brought against it. By the intervention of a stipulation, the written contract at once ceased, the lesser security being merged in the greater. (a) The continental nations, acting by analogy to the civil law, recognize in general two classes of contracts of a superior and inferior nature, the one being public authentic acts ratified and confirmed before witnesses, or in the presence of a magistrate, or a notary public, or a registrar, or judge; the others, private acts, which are entered into and arranged between the parties themselves, without witnesses, and without the ministry or authentication of any public officer. The publicly authenticated contract carries with it full credit; but the private act may be questioned and contradicted, and requires some cause or consideration for its compulsory fulfillment. (b)

200. *Contracts requiring authentication by a signed writing.*—*Contracts for the sale of interests in land.*—By the 29 Car. 2, c. 3, s. 4, no action shall be brought whereby to charge any person upon any contract of sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agree-

Cod. lib. 8, tit. 38, 44. Dig. lib. 46, tit. 4. Instit. lib. 3, tit. 30. Pandect. lib. 50, tit. 17, art. 5, par Pothier, vol. 5, p. 254.

(a) Vinnius, pp. 735, 736, 737.

Perez. prælect. lib. 4, tit. 30. Cod. lib. 14, tit. 30, § 14, ed. Gothofred, p. 238.

(b) "L'obligation sans cause ne peut avoir aucun effet." Code Civile liv. 3, tit. 3, s. 4.

ment upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. This refers to agreements not operating as an immediate transfer or conveyance of an estate or interest in land, but as contracts to make or execute a grant, or transfer, or conveyance, at some subsequent period. (c)¹ Agreements for leases and for the sale, assignment, or surrender of leasehold estates, being contracts for a grant or transfer of an estate or interest in land, are within this clause of the statute, and must consequently be authenticated by a signed writing. (d)² Where anything is done which substantially

(c) Sugd. Vend. 94 n.

(d) Anon. Ventr. 361. Poulteney v. Holmes, Str. 405.

¹ Stevens v. Stevens, 11 Metc. 251; Smith v. Burnham, 3 Sumn. 435; Simms v. Killian, 12 Ired. 252; Hughes v. Moore, 7 Cranch (S. C.) 176; Moore v. Wade, 8 Kan. 380; Richards v. Richards, 9 Gray, 313; Marble v. Marble, 5 N. H. 374; Scott v. McFarland, 13 Mass. 309; Kelley v. Stanberry, 13 Ohio, 408; Agate v. Gignoux, 4 Rob. (N. Y.) 278; Griffin v. Coffey, 9 B. Mon. 462; White v. White, 1 Harr. (N. J.) 202; Keeler v. Tatnall, 3 Zab. (N. J.) 62; Hall v. Hall, 2 McCord Ch. 269; Shotwell v. Sedan, 3 Ham. (Ohio) 5; Madigan v. Walsh, 22 Wis. 501; Delano v. Moneagire, 4 Cush. 42; Slackberger v. Mostatter, 4 Ind. (Port.) 461; Young v. Dake, 5 N. Y. 463. And see Pomeroy v. Winship, 12 Mass. 514; Hogg v. Wilkins, 1 Grant (Pa.) 67.

² An agreement for board and lodging is not a lease under the statute, so as to require a writing, even though the party designate the particular rooms which he wishes to occupy (Wilson v. Martin, 1 Den. 602). And a license to enter upon land to remove property (Parsons v. Camp, 11 Conn. 525), or to straighten a boundary line, or to do any act of a transient nature, is good without a writing (Davis v. Townshend, 10 Barb. 343; People v. Goodwin, 5 N. Y. 565; Whitaker v. Cawthorne, 3 Dev. (N. C.) 389; Claflin v. Carpenter, 4 Metc. 580; Rhodes v. Otis, 33 Ala. 600). As to leases, as affected by this clause of the statute, see Stevens v. Stevens, 11 Metc. 251; Dyer v

amounts to a sale or parting with an interest in land, the contract is within the statute. (e)¹ Where it was agreed between the plaintiff, who was the tenant of a farm, and the defendant, that the plaintiff should surrender her tenancy and prevail on her landlord to accept the defendant as tenant in her place, and that

(e) *Kelly v. Webster*, 12 C. B. 15 C. B., N. S. 717; 33 L. J., C. 290. *Willes, J., Smart v. Jones*, P. 156.

Sandford, 9 Id. 395; *Cook v. Stearns*, 11 Mass. 533; *Whitemarsh v. Walker*, 1 Metc. 313; *Erskine v. Plummer*, 7 Greenl. 457; *Parsons v. Camp*, 11 Conn. 525; *Dubois v. Kelley*, 10 Barb. 496; *Davis v. Townshend*, Id. 343; *People v. Goodwin*, 5 N. Y. 568; *Whitaker v. Cawthorne*, 3 Dev. (N. C.) 389; *Clafin v. Carpenter*, 4 Metc. 580; *Rhodes v. Otis*, 33 Ala. 600.

¹ So, where the act for which a license to enter upon land is granted is of such a nature that it cannot be performed without actual occupation of the land, the license must be in the nature of a lease, and so in writing. Such, for instance, would be a license to enter and mine for ore, or to enter and maintain a dam, &c. (*See Mumford v. Whitney*, 15 Wend. 380; *Duinneen v. Rich*, 22 Wis. 550; *Brown v. Woodward*, 5 Barb. 550; *Brown v. Galley*, 9 Hill & D. 310; *Foot v. New Haven, &c. Co.* 23 Conn. 223; *Desloge v. Peace*, 28 Mo. 588; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Moulton v. Faught*, 41 Me. 298; *Yeakle v. Jacob*, 33 Pa. St. 376; *French v. Owen*, 2 Wis. 250; *Trammell v. Trammell*, 11 Rich. (S. C.) 471; *Carter v. Harlan*, 6 Md. 20; *Collins Co. v. Marcy*, 25 Conn. 239; *Riddle v. Brown*, 20 Ala. 412; *Bridges v. Purcell*, 1 Dev. & B. (N. C.) 492; *Pitman v. Poor*, 38 Me. 237; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Woodward v. Sealey*, 11 Ill. 157; *Houghtaling v. Houghtaling*, 6 Barb. 394; *Benedict v. Benedict*, 5 Day. 464; *Cook v. Stearns*, 11 Mass. 533; *Miller v. Auburn, &c. R. R. Co.* 6 Hill, 61; *Hazleton v. Putnam*, 3 Chand. 227; *Wright v. Freeman*, 5 Harr. & J. 467; *Hays v. Richardson*, 19 M. & J. 366) But see, where a somewhat different rule has seemed to prevail, *Clement v. Durgin*, 5 Greenl. 9; *Sheffield v. Collier*, 3 Kelley, 82; *Woodbury v. Parshley*, 7 N. H. 237; *Sampson v. Burnside*, 13 Id. 264; *Ricker v. Kelley*, 1 Greenl. 119; *Androscoggin Bridge Co. v. Bragg*, 11 N. H. 109; *Sullivan v. Commissioner, &c.* 3 Hamm. 893; *Wilson v. Chalfant*, 15 Ohio 248.

the defendant should then pay her for so doing £100, it was held that the contract amounted to a sale of an interest in land within the statute. (*f*) And, generally, whenever the contract or promise sued upon forms part of one entire contract for an interest in land, it will fail to support an action, if it is not authenticated by writing, (*g*) unless there has been a part performance of the agreement, in which case it may generally be enforced; (*h*) for the courts will not allow the statute of frauds to cover a clearly fraudulent act. (*i*)¹

201. *Contracts for the letting and hiring of furnished houses and lodgings*, by the day, week, or month, are contracts for an interest in land, and must be authenticated by a signed writing, if the contract gives the party a right to any specific apartments; (*k*) but a contract to receive a man into a house and provide him with board and lodging generally, not giving him a right to any specific rooms, has been held not to be a contract for an interest in land. (*l*)² Agreements to furnish houses, entered into between a landlord and an intended lessee or tenant, where the occupation of the house forms the substance of the contract, and the furnishing of it is bargained for only in connection with such occupation, are also contracts for an interest

(*f*) *Cocking v. Ward*, 1 C. B. 868; 15 L. J., C. P. 245.

(*g*) *Haigh v. Kaye*, L. R., 7 Ch. 469.

(*g*) *Hodgson v. Johnson*, E. B. & E. 689; 28 L. J., Q. B. 88. *Horrey v. Graham*, L. R., 5 C. P. 9.

(*h*) *Inman v. Stamp*, 1 Stark. 12. *Edg v. Strafford*, 1 C. & J. 391.

(*k*) *Nunn v. Fabian*, L. R., 1 Ch. 35; 35 L. J., Chanc. 140.

(*l*) *Wright v. Stavert*, 2 Ell. & Ell. 720; 29 L. J., Q. B. 161.

¹ *Schmidt v. Gatewood*, 2 Rich. Eq. (S. C.) 162, *Kinard v. Hiers*, 3 Id. 433; *Whitbridge v. Parkhurst*, 20 Md. 62; *Arnold v. Cord*, 16 Ind. 177; *McBurney v. Willman*, 42 Barb. 390

² *Wilson v. Martin*, 1 Den. 602.

in land. (*m*) If the agreement does not form part of a contract for the letting and hiring of a house, it is then, of course, only a sale and purchase of goods and chattels, and has nothing whatever to do with an interest in land.

202. *Agreements for the sale of a milk-walk*, by which the plaintiff agrees to let the defendant into the occupation of premises, and the defendant agrees to pay rent, rates, and taxes, is a contract for an interest in land, within the statute. (*n*)

203. *Agreements to make alterations and repairs in buildings*, entered into between a landlord and an intended lessee or tenant, where the principal subject-matter of the agreement is the letting of the buildings, and the improvements and alterations are accessorial thereto, and contracted for only in connection with the lease, are contracts involving an interest in land within the statute, and cannot be enforced unless they are authenticated by writing. (*o*) Thus, where the plaintiff, being possessed of a messuage and premises for the residue of a term, agreed to give up possession to the defendant for the residue, in consideration of the defendant's undertaking to do certain repairs to the premises, and the defendant, in pursuance of the agreement, became tenant for the residue of the term, but neglected to fulfill his promise to repair the house, it was held that this was an agreement relating to an interest in land, within the statute. (*p*)¹ But, where

(*m*) *Vaughan v. Hancock*, 3 C. B. 766; 16 L. J., C. P. 1. *Simmons v.*

(*o*) *Vaughan v. Hancock*, 3 C. B. 766.

Simmons, 12 Jur. 8.

(*p*) *Buttémere v. Hayes*, 5 M. & W.

(*n*) *Smart v. Harding*, 24 L. J., C. P. 76.

456. *Earl of Falmouth v. Thomas*, 1 Cr. & M. 89.

¹ *People v. Rickert*, 8 Cow. 226; *Barlow v. Wainwright*, 22 Vern. 88; *Norris v. Morrill*, 40 N. H. 395; *Schuyler v. Leggett*, 2 Cow. 660; *Currier v. Barker*, 2 Gray, 226; *Hollis v. Pool*, 3 Metc. 350.

a tenant in the actual occupation of a house, under an existing demise, orally agreed, in consideration that the landlord would put another story upon the house to pay him £10 per annum upon the cost of the erection, in addition to the rent, and the additional story was built, and the landlord brought his action for the increased payment, it was held that the want of a written contract formed no objection to the action. (q) A contract of this kind, made by a tenant in the actual occupation and enjoyment of the land, and not forming part of the original contract of demise, seems to be a contract for work and labor and the supply of materials, rather than a contract involving an interest in land. And where the defendant agreed to make good all damage done by his workmen in quarrying stone from the plaintiff's land, it was held that this was not an agreement, respecting land, within the statute. (r)

204. *Contracts for services in connection with the transfer of an interest in land.*—Where a lessee, who was restrained from assigning his lease without license, agreed to assign the lease for £100, to be paid by the assignee, and to pay to his landlord £40 out of the £100 for a license, and the license being given, and the assignment executed, and the money received, he then refused to pay the £40, on the ground that there was no written agreement, it was held that the landlord might recover the £40 in an action for money had and received. (s) So, where the plaintiff had made an oral agreement with one Emmanuel, for the purchase of an estate for £600, and then agreed in writing with the defendant to sell him the bargain

(q) *Hoby v. Roebuck*, 7 Taunt. 157; 2 Marsh. 433. *Seago v. Deane*, 1 Moo. & P. 227; 4 Bing. 459.

(r) *Griffiths v. Jenkins*, 10 Jur. N. S. 207.

(s) *Griffith v. Young*, 12 East, 514, 515.

for £40, and the estate was afterwards, at the plaintiff's request, conveyed to the nominee of the defendant, it was held that the defendant was responsible for the payment of the £40. (t) In these cases the contract being executed, the action is in truth an action for a stipulated remuneration for services rendered. If the action is founded on the special contract for the sum agreed to be paid as the price of a transfer of an interest in land, the action will fail if the contract is not in writing, (u) unless it appears that the defendant has received actual possession of the property, and has had all the benefit for which he contracted. (x) Where a contract consists of two collateral agreements, one only of which relates to an interest in land, then, if that part of the contract has been executed, the fact of the whole contract not being in writing, will not preclude an action on the other part founded on a promise to be performed after such execution; but one contract, founded upon one consideration, cannot be bi-sected so as to make a new contract and a new consideration out of one half. (y) Where the defendant, having no interest in a public house, agreed to get plaintiff a lease of it, it was held that this was a contract for an interest in land within the statute. (z)

205. *Agreements concerning landmarks and boundaries.*—If two occupiers of adjoining lands agree that a wall or fence shall be built by one of them as a boundary common to both, and that the other shall pay his proportion of the expense, this is not a con-

(t) *Seaman v. Price*, 1 Ry. & Mood. 195.

(u) *Cocking v. Ward*, 1 C. B. 868.
Kelley v. Webster, 12 C. B. 283; 21 L. J., C. P. 163.

(x) *Green v. Saddington*, 7 Ell. & Bl. 503.

(y) *Hodgson v. Johnson*, E. B. & E. 689; 28 L. J., Q. B. 88.

(z) *Horsey v. Graham*, L. R., 5 C. P. 939 L. J., C. P. 58, sed quære.

tract for an interest in land within the meaning of the statute, (a) and need not consequently be authenticated by a signed writing.

206. *Contracts respecting growing crops—grass—timber, &c.*—An agreement for the sale and purchase of growing grass (*primæ vesturæ*), growing timber or underwood, growing fruit and hops, not made with a view to their immediate severance and removal from the soil, and delivery as chattels to the purchaser, is a contract for the sale of an interest in land, (b) as such things are not distinguishable from the land itself, in legal contemplation, until actual severance; and pass to the heir, and not to the executor; (c) but *fructus industriales*, such as growing crops of turnips, potatoes, and corn, and the annual productions of the soil raised by the labor of man, which are seizable by the sheriff under a *fi. fa.*, and pass to the executor and not to the heir, are considered goods and chattels; and contracts for the sale of them are, from this their original nature, considered to be contracts for the sale of goods and chattels, and not of an interest in land, although they are to remain in the soil and derive a nutriment therefrom until they have arrived at maturity; and the mere license to come upon the land for the purpose of gathering and securing the crop, which is incident to such a contract, is not a sale of an interest in land, within the meaning of the statute. (d) If fruit is sold at so much a bushel, and timber at so much a

(a) *Stuart v. Smith*, 7 Taunt. 158.

(b) *Crosby v. Wadsworth*, 6 East,

610. *Griffiths v. Puleston*, 13 M. & W. 358; 14 L. J., Exch. 33. *Carrington v. Roots*, 2 M. & W. 248. *Scorell v. Boxall*, 1 Y. & J. 398. *Sugd. Vend. Ch. 3. sec. 2.* *Petch v. Tutin*, 15 M. & W. 115.

(c) *Rodwell v. Philips*, 9 M. & W.

504. *Waddington v. Bristow*, 2 B. & P. 455.

(d) *Parker v. Staniland*, 11 East, 362. *Warwick v. Bruce*, 2 M. & S. 208. *Mayfield v. Wadsley*, 3 B. & C. 357; 5 D. & R. 224. *Evans v. Roberts*, 8 D. & R. 614; 5 B. & C. 829. *Watts v. Friend*, 10 B. & C. 446. *Dunne v. Ferguson*, 1 Hayes, 540

foot, with a view to its immediate severance from the soil, and delivery as a chattel to the vendee, the contract is not a contract for the sale of an interest in land, but for the sale of goods and chattels, "the produce of the trees when they should be cut down and severed from the freehold." (*e*) It is the same as if the parties had contracted for so much fruit already picked, or for so many feet of timber already felled. (*f*) But where a man agrees to hire the land and take the crops growing thereon at a valuation, and to pay a certain sum for work and labor and materials expended in getting the lands ready for tillage, this is an entire contract for an interest in land; and the growing crops cannot, in such a case, be treated as goods and chattels. (*g*)

Where a contract was entered into for the sale of a crop of corn on the land, and the profit of the stubble afterwards; and the vendor was to have liberty for his cattle to run with the purchaser's, and the purchaser was to have some potatoes growing on the land and whatever lay grass was in the fields, and was to harvest the corn and dig up the potatoes, and the vendor was to pay the tithe, it was held that this was not a contract for any interest in land, but a sale of goods and chattels as to all but the lay grass; and, as to that, a contract for the agistment of the purchaser's cattle. (*h*) If the contract is within the 4th section of the statute as a contract for the sale of an interest in land, it must be authenticated by writing; and, if it does not fall within that section, but within the 17th, as a contract for the sale of goods and

(*e*) *Smith v. Surman*, 9 B. & C. 568.

(*f*) *Lord Abinger, Rodwell v. Phillips*, 9 M. & W. 505. *Rolfe, B., Washbourne, v. Burrows*, 16 L. J., Exch. 266; 1 Exch. 115.

(*g*) *Earl of Falmouth v. Thomas*,

1 Cr. & M. 89. *Harvey v. Grabham*, 5 Ad. & E. 62.

(*h*) *Jones v. Flint*, 10 Ad. & E.

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chattels, there must still be writing, unless the value of the subject-matter of the contract does not amount to £10, or the growing produce has been severed and delivered, or earnest has been given, or a part payment made, or there has been a part acceptance and receipt.¹

207. *Authentication of executory contracts for the sale of goods or chattels.*—By the 17th section of the statute of frauds, no contract for the sale of any goods, wares, and merchandise for the price of ten pounds sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part payment, or except some note or memorandum in writing of the bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized. This section was held not to extend to contracts for the making and manufacture of goods, *i. e.*, contracts to make and complete and deliver, at some subsequent period, goods not in existence, and consequently not capable of delivery or of part acceptance at the time of the making of the contract, such as contracts to build a ship, or make a

¹ See, generally, as to the rules stated in the text in regard to things growing, *Warren v. Leland*, 2 Barb. 613; *Bank of Lansingburg v. Crary*, 1 Id. 542; *Smith v. Bryan*, 5 Md. 141; *Miller v. Baker*, 1 Metc. 27; *Smith v. Price*, 39 Ill. 28; *Cain v. McGuire*, 13 B. Mon. 340; *Nettleton v. Sikes*, 8 Metc. 34; *Clafflin v. Carpenter*, 4 Id. 580; *Whitmarsh v. Walker*, 1 Id. 313; *Ers- kine v. Plummer*, 7 Greenl. 447; *Putney v. Day*, 6 N. H. 430; *McIlvaine v. Harris*, 20 Mo. 457; *Powell v. Rich*, 41 Ill. 466; *Olmstead v. Niles*, 7 N. H. 522; *Buck v. Pickwell*, 1 Williams (Vt.) 157; *Byassee v. Reese*, 4 Metc. (Ky.) 372; *Huff v. McCauley*, 53 Pa. St. 206; *Brecker v. Hughes*, 4 Ind. 146; *Shorey* *Picker*, 10 Id. 375; *Ball v. Griswold*, 19 Ill. 631; *Bryant v. y*, 40 Me. 9; *Marshall v. Ferguson*, 23 Cal. 65; *Gilmore* *ur*, 12 Pick. 120; *Kingsley v. Holbrook*, 45 N. H. 313.

chariot, &c., and which were considered to be contracts for work and labor and the supply of materials, rather than contracts of sale; (i)¹ whereupon the 9 Geo. 4, c. 14, s. 7, was passed, which extends the provisions of the statute of frauds respecting the sale of goods to all contracts for the sale of goods of the value of £10 and upwards, "notwithstanding the goods may be intended to be delivered at some future time, or may not, at the time of such contract, be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof and rendering the same fit for delivery." (k) The statute applies only to executory contracts for the sale of goods and chattels, where the party sought to be charged as the purchaser has not accepted or received the goods. If the goods have been delivered to and received by the buyer, the latter cannot of course, resist payment of the price on the ground that there is no memorandum in writing of the contract. (l) The two sections of these statutes are to be read together; and the consequence is that the word "value" in the last-named, is substituted for the word "price" in the first-named statute. (m)

208. *Contracts for the sale of fixtures and shares.*—Contracts for the sale of fixtures are not

(i) *Grooves v. Buck*, 3 M. & S. 178.

(l) *Searle v. Keeves*, 2 Esp. 598. *Mavor v. Pyne*, 11 Moore, 6. *Teal*

(k) *Lee v. Griffin*, 1 B. & S. 272; 30 L. J., Q. B. 252.

v. Auty, 2 B. & B. 100.

(m) *Harman v. Reeve*, 18 C. B. 595.

¹ *Ellison v. Brigham*, 38 Vt. 66; *Downs v. Ross*, 23 Wend. 270; *Houghtaling v. Ball*, 19 Mo. 84; *Jackson v. Covert*, 5 Wend. 139; *Parsons v. Zoucks*, 4 Rob. (N. Y.) 216; *Seewall v. Filch*, 8 Cow. 219; *Crookshank v. Burrell*, 18 Johns. 58; *Robertson v. Naughan*, 5 Sandf. 1; *Bronson v. Wiman*, 10 Barb. 406; *Donovan v. Wilson*, 26 Id. 138; *Bennett v. Hall*, 10 Johns. 364; *Reutch v. Long*, 27 Md. 188; *Waterman v. Meigs*, 4 Cush. 499.

within the operation of the statute of frauds, inasmuch as they are not goods and chattels within the meaning of the statute, nor do they constitute, although annexed to the freehold, an interest in land. (*n*)¹ Railway shares also, and shares in the profits of a mine, are neither interests in land, nor are they goods and chattels; and contracts for the purchase and sale of them are not, consequently, within the statute, and do not require to be authenticated by writing; (*o*) but the transfer of the share in fulfillment of a contract of sale, must, in general, be made in writing or by deed. If each shareholder in a mine has a joint interest in the land itself, that interest cannot pass except in the mode prescribed by the 4th section of the statute of frauds; but if each shareholder has merely a right to a divisible proportion of the profits of the adventure, the case is not within the statute. (*p*)²

209. Promises by executors and administrators.—

By the 4th section of the statute of frauds, no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some

(*n*) Parke, B., 1 C. M. & R. 275. *ble v. Mitchell*, 11 Ad. & E. 205.
Hallen v. Runder, Id. 266; 3 Tyr. *Bradley v. Holdsworth*, 3 M. & W.
 959. *Lee v. Risdon*, 7 Taunt. 191. 422. *Tempest v. Kilner*, 3 C. B. 249.
 Parke, J., 2 Sc. 249. *Pinner v. Arnold*,
Bowlby v. Bell, Id. 284.
 1 Tyr. & Gr. 1. (*p*) *Watson v. Spratley*, 10 Exch.

(*o*) Parke, B., 6 M. & W. 214. *Hum- 243. Powell v. Jessop*, 18 C. B. 354.

¹ *Bostwick v. Leach*, 3 Day, 476; *Keyson v. District No. 8*, 35 N. H. 477.

² And see *Tippets v. Walker*, 4 Mass. 593; and, in New York, *Vanpell v. Woodward*, 2 Sandf. Ch. 143.

other person thereunto by him lawfully authorized.¹ We have already seen (*q*) that the promise of an executor or administrator to pay the debt of his testator or intestate, is a mere nudum pactum, and does not impose any personal liability upon the latter, or make him chargeable in his own right, unless there is some consideration for the promise. And the putting of the promise into writing, pursuant to the statute, does not do away with the necessity of a consideration; "for the statute was made for the relief of personal representatives, and did not intend to charge them further than by common law they were chargeable." (*r*)

210. *Promises to answer for the debt, default, or miscarriage of another.*—The statute of frauds further enacts (s. 4), that no action shall be brought, whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged

(*q*) *Ante*, p. 12.

(*r*) *Rann v. Hughes*, 7 T. R. 350, n.

¹ See *Pratt v. Humphrey*, 22 Conn. 317; *Silsbe v. Ingalls*, 10 Pick. 326; *Stebbins v. Smith*, 4 Pick. 97; *McKeenan v. Thissell*, 33 Me. (3 Redf.) 368; *Wyman v. Smith*, 2 Sandf. 331; *Hitchcock v. Lukens*, 8 Port. 333; *Loomis v. Newhall*, 15 Pick. 159; *Todd v. Tobey*, 29 Me. (16 Shep.) 219; *Corbin v. McChesney*, 26 Ill. 231; *Lucas v. Payne*, 7 Cal. 92; *Nelson v. Hardy*, 7 Ind. 364; *Consociated, &c. Society v. Staples*, 23 Conn. 554; *Stouldt v. Hyne*, 45 Pa. St. 30; *Clymer v. De Young*, 54 Id. 118; *McLuren v. Hutchinson*, 22 Cal. 87; *Hilton v. Dinsmore*, 21 Me. (8 Shep.) 410; *Cameron v. Clark*, 11 Ala. 259; *Lanig v. Lee*, *Spencer* (N. J.) 337; *Goddard v. Mockbee*, 5 Cranch, 666; *Stanley v. Hendricks*, 13 Ired. 86; *Lee v. Fontaine*, 10 Ala. 755; *McKenzie v. Jackson*, 4 Id. 230; *Quin v. Hanford*, 1 Hill (N. Y.) 82; *Lippincott v. Ashfield*, 4 Sand. 611; *Dilts v. Parke*, 1 South (N. J.) 219; *Simpson v. Nance*, 1 Speers (S. C.) 4; *State Bank v. Mettler*, 2 Bosw. 392; *Colt v. Root*, 17 Mass. 229.

therewith, or some other person thereunto by him lawfully authorized. This clause does not apply to the case where a party giving a guarantee is himself liable to the demand which he is purporting to guarantee; it must be exclusively the debt, default, or miscarriage of another. (s)¹ But it applies to a promise to be answerable for a tortious act as well as a breach of contract; such as a promise to the lender of a horse to be answerable for the safe riding and re-delivery of it by the borrower, or a promise to the owner of a horse injured by an act of trespass, to make good the damage on condition that he would not sue the trespasser. (t) But it has been held that the statute applies only to promises made to the person to whom another is answerable, (u) and that it must be a promise to answer for a debt of, or a default in some

(s) *Orrell v. Coppock*, 26 L. J., Ch. Salk. 28, n. b.; 6 Mod. 249. *Kirk-269. Couturier v. Hastie*, 22 L. J., ham v. Marter, 2 B. & Ald. 613.

Ex. 97.

(u) *Eastwood v. Kenyon*, 11 Ad. &

(t) *Birkmyr v. Darnell*, Raym. 1085; E. 446.

¹ See *Allen v. Thompson*, 10 N. H. 32; *Gardner v. Hopkins*, 5 Wend. 23; *French v. Thompson*, 6 Vt. 54; *Olmstead v. Greenly*, 18 Johns. (N.Y.) 12, 13; *Hindman v. Langford*, 3 Stroben (S. C.) 207; *Wolff v. Koppel*, 5 Hill, 458, aff. 2 Den. 248; *Doolittle v. Naylor*, 2 Bosw. 206. The actual indebtedness must be shifted to the new promissor (*Kingsley v. Balcome*, 4 Barr. 131; *Emerson v. Slater*, 22 How. 28). And see *Morgan's De Colyar on Guaranty*, note (*), p. 130, and cases cited; *Nelson v. Boynton*, 3 Metc. (Mass.) 396; *Chandler v. Davidson*, 6 Blackf. (Ind.) 867; *Alger v. Scoville*, 1 Gray (Mass.) 391; *Besshears v. Rowe*, 46 Mo. 501; *Harris v. Young*, 40 Ga. 65; *Fullam v. Adams*, 37 Vt. 391; *Connor v. Williams*, 2 Rob. (N. Y.) 46; *McLaren v. Hutchinson*, 22 Cal. 107; *Clymer v. De Young*, 54 Pa. St. 118; *Ford v. Furney*, 35 Ga. 258; *Hearing v. Dittman*, 2 Phil. 307; *Allwin v. Garberick*, Id. 637; *Carothers v. Connolly*, 1 Mon. T. 433; *Ellwood v. Fults*, 63 Barb. 321; *McCreery v. Van Hook*, 35 Tex. 631; *Howland v. Aitch*, 33 Cal. 133; *Wyman v. Goodrich*, 26 Wis. 21; *Hedges v. Strong*, 3 Oreg. 18; *Ludwick v. Watson*, Id. 256; *Stewart v. Henkle*, 1 Bond, 506; *Hiltz v. Scully*, 1 Cinc. (Ohio) 555.

duty by, that other person towards the promisee, (*v*) and, therefore, that a promise by B to indemnify A against all liability, if he would become bail for the appearance of C to answer a charge of misdemeanor, is not a promise to answer for the debt or default of another within the statute, since no debt or duty was owing from C to A. (*x*) On the other hand, a promise to indemnify another from the consequences of becoming bail for a third person in a civil action, has been held to be within the statute, a decision which is to be supported, if at all, on the ground that the person bailed is legally bound to indemnify his bail by surrendering or paying the debt. (*y*) A promise by one parishioner to indemnify another against the consequences of resisting a claim of tithe, is not a promise to be responsible for the default of another, but a promise to pay what the promisee may lose by defending the promiser's interests in a suit. (*z*) If A, in consideration that B will stay proceedings in an action he has commenced against C, to recover a sum of money due to him from C, promises to pay that money, such promise is a promise to answer for the debt of another within the 4th section of the statute. (*a*)¹

(*v*) *Hargreaves v. Parsons*, 12 M. & E. 453. But see *Batson v. King*, 4 W. 570. *Thomas v. Cook*, 8 B. & C. H. & N. 739; 28 L. J., Ex. 327; and 728. *Reader v. Kingham*, 13 C. B., Cripps *v. Hartnoll*, 4 B. & S. 414; 32 N. S. 344; 32 L. J., C. P. 108. L. J., Q. B. 381.

(*x*) *Cripps v. Hartnoll*, 4 B. & S. (*z*) *Adams v. Dansey*, 6 Bing. 506; 414; 32 L. J., Q. B. 381. 4 Moo. & P. 245.

(*y*) *Green v. Cresswell*, 10 Ad. & (*a*) *Fish v. Hutchinson*, 2 Wils. 94.

¹ Where the promise to indemnify is in reality a promise to pay a debt which the promiser may himself be found to owe, it would be, in one sense, outside of the statute (*Kelsey v. Hines*, 13 Ohio, 340; *Kingsley v. Balcombe*, 4 Barb. 131; *Harrison v. Sawtiel*, 10 Johns. 242; *Carville v. Crane*, 5 Hill, 483; *Smith v. Sayward*, 5 Greenl. 504; *Perley v. Spring*, 12 Mass. 296; *Beaman v. Russell*, 30 Vt. 205; *Holmes v. Knight*, 10 N. H. 175). In Vermont, in Georgia, and Kentucky, promises

The operation of the statute is not confined to collateral undertakings to be answerable for a subsisting debt or duty: it extends to undertakings made before the debt accrues or the duty arises; and a guarantee, consequently, which a tradesman, before he sends out goods on credit, requires from a third party, because he does not like to trust the person for whose use the goods are intended, is within the statute, if the latter has been treated by the tradesman as his debtor. (b) Thus, where the plaintiff, having commenced certain business for one Fox, refused to go on with it, without a promise by the defendant to pay the further expenses to be incurred, it was held that this promise was within the statute; (c) and where the defendant verbally promised that, if the plaintiff would supply A with iron and take A's acceptances, he would discount them, it was held that this was a promise to answer for the default of another, and, not being in writing, could not be enforced. (d)¹

But the sale may be to one man, although the goods are to be delivered to another; and a person may promise to pay for goods supplied to, or for work

(b) *Peckham v. Faria*, 3 Doug. 13. (c) *Barber v. Fox*, 1 Stark. 270.
Parsons v. Walter, Id. 14, n. c. Mat- (d) *Mallett v. Bateman*, L. R., 1 C.
son v. Wharam, 2 T. R. 80. P. 163; 35 L. J., C. P. 40.

to indemnify have been held not within the statute (*Jones v. Shorter*, 1 Kelley, 294; *Dunn v. West*, 5 B. Mon. 382). In New York, *Kingsley v. Balcombe*, 4 Barb. 131, and *Carville v. Crane*, 5 Hill, 483, hold that a promise to indemnify need not be in writing. In Maine, the old doctrine that a promise to indemnify was not within the statute was followed, but the two cases on which the doctrine rests are criticised in a note to *Browne* on the Statute of Frauds, § 160.

¹ And the doctrine of the text seems to be upheld in the following cases: *Wheeler v. Mayfield*, 31 Tex. 392; *Wood v. Sherman*, 71 Pa. St. 100; *Reed v. Fish*, 50 Me. 358. And see *Hayden v. Crane*, Lans. 181; *Buckhead v. Brown*, 5 Hill, 639; 2 Den. 373.

done at his request or by his directions for, a third party, as the real debtor, and not in the character of a surety; and, if he has been treated by the person who has furnished the goods, or done the work as the party liable and credit has been given to him, his promise or undertaking to pay is not a collateral promise to answer for the debt of another, and the case consequently is out of the statute. (e) If two come to a shop, and one buys, and the other, to gain him credit, promises the seller, "if he does not pay you, I will," this is a collateral undertaking, void without writing by the statute. But, if he says, "Let him have the goods, I will be your paymaster," this is an undertaking as for himself; and he shall be intended to be the very buyer. (f) If the person for whose use the goods are furnished is liable at all, or if his liability is made the foundation of a contract by another to be liable for the goods, the contract is a promise to indemnify, and is void if not in writing; but, if the parties do not contemplate the liability of a principal debtor, the promisor is primarily liable, and the contract is not within the statute. (g)¹ Where the defendant, in consideration that the plaintiff, at the request of the defendant, would provide a workman with materials for his work, promised the plaintiff, to pay him a reasonable sum for such materials out of such moneys received by him as should become due to the workman in respect of the work, it was held that this was not a promise by a surety to answer for the debt

(e) *Hargreaves v. Parsons*, 13 M. & W. 561. *Raym.* 224. *Seaman v. Price*, 1 C. & P. 586; 10 Moore, 34. *Mountstephen v. Lakeman*, L. R., 7 Q. B. 196; 41 L. J., Q. B. 67.

(g) Per Willes, J., *Mountstephen v.*

(f) *Birkmyr v. Darnell*, 1 Salk. 27; *Lakeman, L. R.*, 7 Q. B. 196; 41 L. Mod. 250. *Watkins v. Perkins*, J., Q. B. 67.

¹ *Besshears v. Rowe*, 46 Mo. 501; *Gardner v. Hudgins*, Id. 399; *Jefferson County v. Slagee*, 66 Pa. St. 202.

or default of another, within the meaning of the statute, but an original independent contract. (*h*) If goods are furnished to an infant at the request of the defendant, the defendant's undertaking or promise to pay for them is not a collateral promise to answer for the debt of another, inasmuch as the infant is not liable to pay for them, and cannot be indebted, by reason of his minority. (*i*)

The contract of a factor, binding him in the terms implied by a *del credere* commission, is not within the statute of frauds. The contract is the factor's own contract; and the debt of another comes in incidentally only as a measure of damages. (*k*) Where the defendant, in consideration that the plaintiff would discharge a debtor out of custody, promised the plaintiff to pay him the debt, it was held that this was not a collateral promise to answer for the debt of another, the debt being extinguished by the discharge of the debtor. (*l*) Where the defendant, in order to get rid of an incumbrance on his own property, or to obtain some direct personal advantage to himself, promises to pay the debt of another, the promise is not within the statute. And if the original debt be discharged and extinguished by the substitution, in lieu thereof, of a new contract by a third person, to pay the amount of that debt, such new contract is not a collateral promise to answer for the debt or default of another. (*m*) Thus, where a purchaser of goods, being

(*h*) *Andrews v. Smith* 2 C. M. & R. 627. *Sweeting v. Asplin*, 7 M. & W. 173. *Gerish v. Chartier*, 1 C. B. 13.

(*i*) *Harris v. Huntbach*, 1 Bur. 373. *Duncombe v. Tickridge*, Ayley, 94; 1 Wms. Saund. 211 d.

(*k*) *Wolff v. Koppell*, 5 Hill N. Y. R. 458. *Counturier v. Hastie*, 8 Exch. 56.

(*l*) *Goodman v. Chase*, 1 B. & Ald.

297. *Butcher v. Steuart*, 11 M. & W. 857; 12 L. J., Exch. 391. *Lane v. Burghart*, 1 Q. B. 937. *Bird v. Gammon*, 5 Sc. 213; 3 Bing. N. C. 883.

(*m*) *Hodgson v. Anderson*, 5 D. & R. 746, 747; 3 B. & C. 855, 856. *Lacy v. M'Neile*, 4 D. & R. 7. *Taylor v. Hilary*, 1 C. M. & R. 743; 1 Dowl. 461.

unable to pay for them, transferred and delivered them to the defendant, and the latter promised the vendor to pay for them, it was held that this was a substitution of a new contract of sale and a new purchaser, in lieu of the original contract of sale; that the original purchaser was discharged from all liability in respect of the goods; and that, his debt being extinguished, the promise was not a promise to be answerable for the debt of another. (n)¹

(n) *Browning v. Stallard*, 5 Taunt. 450.

¹ A factor del credere is one who guarantees the solvency of a purchaser from him. If the purchaser, therefore, once pays him, his liability is at an end (*Leverick v. Meigs*, 1 Cow. 645; *Henbach v. Mollmann*, 2 Duer, 227; *Colton v. Dunham*, 2 Paige, 267; *Swan v. Nesmith*, 7 Pick. 229). If he is liable for due diligence in sending the remittance, it is an ordinary agent or factor (*Leverick v. Meigs*, ubi supra; *Sherwood v. Stone*, 14 N. Y. 267; *Bradley v. Richardson*, 23 Vt. 720, 731). The contract del credere is in addition to, and not in variation of, the ordinary contract between principal and agent. The peculiar obligation of the del credere factor to his principal is not a primary but a secondary one. He is a surety and not a debtor (*Morgan's De Colyar on Guaranty*, note f, p. 158). But see this questioned in *Edwards on Bailments*, pp. 280, 281; *Dunlap's Paley on Agency*, p. 110, note; *Hurlbut v. Pacific Ins. Co.* 2 Sumn. 480. But his engagement is not to be regarded as a collateral promise within the statute of frauds; nor is his obligation so contingent as to require legal measures to be exhausted against the purchaser before the factor is bound. It amounts rather to an engagement to see that the principal receives his money upon the day it becomes due, not merely by the receipt of acceptances from the buyer, but by the absolute payment in money, or other medium authorized by, or satisfactory to, the principal (*Story on Agency*, §§ 98, 215; *Muhler v. Bohlens*, 2 Wash. C. C. 378; *Tompkins v. Perkins*, 3 Mason, 232; *Holbrook v. Wright*, 2 Wend. 169; 2 Kent Com. (12th ed.) 625, note g). A factor del credere may sue a debtor in his own name (*Sherwood v. Stone*, 14 N. Y. 267). But see *Bramber v. Spiller* (English) 5 W. R. 316; and see *Holbrook v. Wright*, 24 Wend. 169; *Thompson v. Parkens*, 3 Mason, 232, and note to *Morgan's De Colyar on Guaranty*, &c. p. 158.

A contract or promise, although made concerning the debt or default of a third party, may yet be an original contract not within the statute. (o) If the plaintiff has a lien upon the goods and chattels of his debtor in his possession, or if he holds securities for the payment of his debt, and is induced either to give up his lien upon the goods, or to part with his securities, upon the faith of a promise, made by the defendant, to pay the amount of the plaintiff's claim thereon, the promise so made is not within the mischief intended to be provided against by the statute of frauds. (p) Where the plaintiff had distrained upon his tenant, for rent in arrear, and afterwards delivered up the goods and chattels to the defendants, for the use of the tenant, upon the faith of an undertaking, by the defendants, to pay the rent, it was held that the undertaking was not within the statute. (q)¹

211. *Agreements in consideration of marriage.*—The 4th section of the statute of frauds further enacts that no action shall be brought whereby to charge

(o) *Walker v. Hill*, 5 H. & N. Dressler, 7 C. B., N. S. 374; 29 L. J., 419. C. P. 113.

(p) *Barker v. Birt*, 10 M. & W. 61. (q) *Edwards v. Kelly*, 6 M. & S. Barrell v. Trussell, 4 Taunt. 117. 204. *Williams v. Leper*, 3 Burr. 1887. *Meredith v. Short*, Salk. 25. *Castling Bampton v. Paulin*, 12 Moore, 497. *v. Aubert*, 2 East. 325. *Walker v. Houlditch v. Milne*, 3 Esp. 86; 1 Wms. Taylor, 6 C. & P. 752. *Fitzgerald v. Savnd*, 211 d., 211 e., ed. 1845.

¹ *Curtis v. Brown*, 5 Cush. 491, 492; *King v. Despard*, 5 Wend. 227; *Nelson v. Boynton*, 2 Metc. 396; *Corkins v. Collins*, 16 Mich. 478; *Arnold v. Stedman*, 45 Penn. 186; *Alger v. Scoville*, 1 Gray, 398; *Smith v. Sayward*, 18 Greenl. 504, *Boyce v. Owen*, 2 McCord, 208; *Scott v. Thomas*, 1 Scam. 58; *Stern v. Drinker*, 2 E. D. Smith, 401; *Vanslyck v. Pulver*, Hill & Den. Supp. 47; *Fay v. Bell*, Id. 251; *Mallory v. Gillett*, 23 Barb. 610; *Spooner v. Dunn*, 7 Ind. 81; *Sampson v. Hobart*, 28 Vt. 697; *Cross v. Richardson*, 30 Id. 641; *Shook v. Van Mater*, 22 Wis. 532; *Fish v. Thomas*, 5 Gray (Mass.) 45; *Stewart v. Campbell*, 58 Me. 439; *Luark v. Malone*, 34 Ind. 444; *Ames v. Foster*, 100 Mass. 400.

any person upon any agreement made in consideration of marriage, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. This does not extend to the marriage contract itself. Promises of marriage, consequently, are binding, though not reduced into writing and signed by the party sought to be charged thereon. (r) But all promises and agreements made by one person, in consideration of the completion of a marriage by another, are within the statute, and must be reduced into writing. The solemnization of the marriage does not take the case out of the operation of the statute. (s) A letter written by a father, signifying his assent to the marriage of his daughter with J. S., and that he would give her a marriage-portion of £500, was held a sufficient promise in writing, within the statute. (t) A promise before marriage, by the husband to the wife that, if she will forego a contemplated settlement, he will make the same provision for her by his will, is within the statute, and cannot be enforced if not made in writing. (u)¹

(r) *Cork v. Baker*, 1 Str. 34. *Harrison v. Cage*, 1 Raym. 386.

(s) *Caton v. Caton*, L. R. 1 Ch. 137; Id. 2 H. L. 127; 35 L. J., Ch. 292; 36 L. J., Ch. 886.

(t) *Countess of Mountague v. Maxwell*, 1 Str. 236. *Bird v. Blossie*, 2

Ventr. 361. *Bac. Abr. Agreements* (C) 3.

(u) *Caton v. Caton*, L. R., 1 Ch. 137; Id. 2 H. L. 127; 35 L. J., Ch. 292; 36 L. J., Ch. 886. But see

Williams v. Williams, 37 L. J., Ch. 854.

¹ See *Clark v. Pendleton*, 20 Conn. 508; *Dunn v. Thorp*, 4 Ired. Eq. (N. C.) 7; *Hatcher v. Robertson*, 4 Stroblh. 179; *Riley v. Riley*, 25 Conn. 154; *Dugan v. Gittings*, 3 Gill. 138; *Chichester v. Mass*, 1 Munf. 98; *Reade v. Livingston*, 3 Johns. Ch. 481; *Winn v. Albert*, 2 Md. Ch. Dec. 169; 5 Md. 66; *Izard v. Izard*, Bailey Eq. (S. C.) 236; *Andrews v. Jones*, 10 Ala. 400; *Bloy v. Maynard*, 2 Leigh (Va.) 29 *Smith v. Greer*, 3

212. *Agreements not to be performed within a year.*—The 4th section of the statute of frauds further enacts that no action shall be brought whereby to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized. This extends to all contracts which are not by the terms of them to be fully and completely executed within a year. A part performance of the contract will not, consequently, take it out of the provisions of the statute. Thus, where a person had become a subscriber to the “*Boydell Shakespeare*,” a work which was published in numbers, and could not be, and was not intended to be, completed within a year, and had taken and paid for several numbers as they came out, and then refused to continue his subscription and complete the set, it was held that an action could not be maintained against him for his subscription, as there was no written contract signed by him according to the statute. (*v*)¹ But, in respect of services rendered and things actually done under such a contract, the terms upon which the services were rendered and the things done may be proved by oral testimony. (*x*) If the

(*v*) *Boydell v. Drummond*, 11 East. 90. *Roberts v. Tucker*, 3 Exch. 632. 154, 158. *Sweet v. Lee*, 4 Sc. N. R. (*x*) *Souch v. Strawbridge*, 2 C. B.

Humph. 118; *Wood v. Savage*, 2 Doug. (Mich.) 316; *Argenbright v. Campbell*, 3 Hen. & M. 144; *Davidson v. Graves*, *Riley Eq. (S. C.) 222*; *Borst v. Corey*, 16 Barb. 136.

¹ *Herrin v. Butters*, 20 Me. (2 Appleton) 119; *Saunders v. Kastenbine*, 6 B. Mon. (Ky.) 17; *Peters v. Inhabitants, &c.* 19 Pick. 365; *Linscott v. McIntyre*, 3 Shep. (15 Me.) 201; *Hinkley v. Southgate*, 11 Vt. 428.

contract be for more than a year, the fact that it is defeasible within the year will not take it out of the operation of the statute. (*y*)¹ A contract whereby a coachmaker agrees to let a carriage for a term of five years, in consideration of an annual payment for the use of it, but which, by the custom of the trade, is terminable at any time within that period, on payment of a year's hire, is an agreement not to be performed within a year, within the meaning of the statute. (*z*) So also is a contract for a year's service to commence on a day subsequent to the making of the contract; for a contract which extends one minute beyond the time pointed out by the statute falls within its prohibition. (*a*)² But a contract, or general hiring for one year from the time of the making of the contract, and so on from year to year so long as the parties shall respectively please, has been held not to extend beyond the time limited by the statute, and is not, consequently, within the provisions of the 4th section. (*b*)³

The statute does not extend to contracts which are to be performed upon the happening of some uncertain event, and which consequently may or may not be completed within a year. Thus it has been laid down that, "where the agreement is to be per-

808; 15 L. J., C. P. 172. *Collis v. 722. Snelling v. Lord Huntingfield*, 1 C. M. & R. 25. See *Cawthorne v. Botthamley*, 7 W. R. 87.

(*y*) *Dobson v. Collis*, 1 H. & N. 84. *Cordrey*, 13 C. B., N. S. 406; 22 L. J., C. P. 152.

(*z*) *Birch v. The Earl of Liverpool*, 9 B. & C. 392. (*b*) *Beeston v. Collyer*, 12 Moore, 552; 4 Bing. 309. *Giraud v. Richmond*, 2 C. B. 835.

(*a*) *Bracegirdle v. Heald*, 1 B. & Ald.

¹ *Harris v. Porter*, 2 Haring. 27; *Sherman v. Champlain Transportation Co.* 31 Vt. 162; *Trustees, &c. v. Brooklyn Fire Ins. Co.* 19 N. Y. 305.

² *Shute v. Dorr*, 5 Wend. 204; *Doyle v. Dixon*, 97 Mass. 207; *Hill v. Hooper*, 1 Gray, 131. And see *Wiggins v. Keizer*, 6 Ind. 252.

³ See *Drummond v. Burrill*, 13 Wend. 307.

formed upon a contingency, and it does not appear, in the agreement, that it is to be performed after a year, a note in writing is not necessary, for the contingent and uncertain event might happen within the year; but, where it appears, by the whole tenor of the agreement, that it is to be performed after the year, a note is necessary." (c)¹ An agreement, therefore, to pay the plaintiff so many guineas on the day of his marriage, was held not within the statute, although the marriage did not take effect for nine years, for it might have happened within a year. (d) So too a verbal promise, founded upon a good consideration, to leave the plaintiff a legacy of a certain amount, has been held to be binding. (e) And, where an oral promise was made to pay so much money on the return of a ship, which did not happen for two years, it was held that the promise was not within the statute, for the ship might have returned within the year, though by accident it happened that it did not. (f) Neither does the statute apply where the contract is wholly executed, or intended to be so, by one of the parties thereto, within the year, although there are some acts to be done by the other party beyond the prescribed limit. Thus, where a landlord agreed to lay out £50 in improvements upon the demised premises, and the tenant agreed to pay £5 per annum for the remainder

(c) *Wells v. Horton*, 12 Moore, 182,

183; 4 Bing. 43, 44. *Smith v. Neale*, 462.

2 C. B., N. S. 67; 26 L. J., C. P. 143.

(d) *Peter v. Compton*, Skin. 353;

Holt, 326. *Smith v. Westall*, 1 Raym. 353.

316.

(e) *Ridley v. Ridley*, 34 L. J., Ch.

462.

(f) *Anon.*, Salk. 280. *Fenton v.*

Emblers, 3 Burr. 1282; 1 W. Bl.

353.

¹ See *Izard v. Middleton*, 1 Dessaus Gh. (S. C.) 116; *Bell v. Hewett's Ex.* 24 Ind. 280; *Quackenbust v. Ehle*, 5 Barb. 469; *Thompson v. Gordon*, 3 Strobb. 196; *King v. Hanna*, 9 B. Mon. 369; *Critcher v. Zeh*, 5 Hill, 200; *Clark v. Pendleton*, 20 Conn. 495.

of his term, of which several years were then unexpired, in addition to the reserved rent, and the £50 was expended within the year, and the landlord afterwards brought his action for the arrears of the £5, it was held that he was entitled to recover, though the agreement had not been put into writing and signed. (g)¹

213. *Requisites of the written memorandum of the contract.*—If one person signs and forwards to another a written proposal, and this proposal is accepted and acted upon by the party to whom it is sent, there is a sufficient memorandum of the contract to satisfy the 4th section of the statute of frauds, and charge the sender, provided the terms of the contract can be ascertained from the written proposal construed in connection with the surrounding circumstances. (h) A letter making an offer or tendering certain terms for acceptance may be interpreted by the aid of other letters between the same parties referring to the same subject-matter for the purpose of establishing the terms of a contract within the 4th section of the statute, (i) provided no extrinsic evidence is required to connect them. (k) And indeed any printed papers or

(g) *Donellan v. Read*, 3 B. & Ad. 906. *Cherry v. Heming*, 4 Exch. 631. *Mavor v. Pyne*, 11 Moore, 2.

(h) *Smith v. Neale*, 2 C. B., N. S. 86; 26 L. J., C. P. 143. *Reuss v. Pick-
sley*, L. R., 1 Exch. 342; 35 L. J.,
Exch. 218. *Peek v. The North Staff-
ordshire Railway Company*, 32 L. J.,
Q. B. 241. *Warner v. Wilmington*, 3
Drew. 523. *Liverpool Borough Bank
v. Eccles*, 4 H. & N. 143; 28 L. J.,

Exch. 122. *Bird v. Blosse*, 2 Ventr.
361. *Ld. St. Leonards, Ridgway v.
Wharton*, 6 H. L. C. 293.

(i) *Peek v. The North Staffordshire
Railway Company*, 32 L. J., Q. B.
241. *Ridgway v. Wharton*, 6 H. L.
C. 238; 27 L. J., Ch. 46.

(k) See *Chapman v. Callis*, 9 C. B.
N. S. 769; 30 L. J., C. P. 241. *Peek
v. North Staffordshire Railway Com-
pany*, 32 L. J., Q. B. 241.

¹ See *Cabot v. Haskins*, 3 Pick. 83; *Lockwood v. Barnes*, 3
Hill, 128; *Broadwell v. Gilman*, 2 Den. 87; *Holbrook v.
Armstrong*, 1 Fairfield, 31; *Pierce v. Paine's Estate*, 28 Vt. 34;
Wilson v. Roy, 13 Ind. 1; *Emery v. Smith*, 46 N. H. 151.

communications in writing which may have passed between the parties, forming on the face of them part of one connected transaction, may be incorporated and construed together, and made to establish the requisite written evidence of an "agreement." (*l*)¹ But the names of the parties and the terms of the contract must appear from a comparison of the writings themselves; and they must manifestly refer to the same contract and transaction, and must not be contradictory to each other. (*m*)²

If two parties have entered into an agreement for the performance of particular acts or duties, it is not necessary to show that the memorandum of the agreement has been signed by both parties, in order to render the one who has signed it liable upon the contract. Thus, if an agreement has been made by word of mouth for the purchase and sale of an estate, and the purchaser signs a memorandum by which he agrees to buy the property for a certain sum from the vendor, and the vendor is ready to establish his title, and is willing and offers to convey the property to the purchaser, the latter cannot escape from his agreement to buy, by saying that the vendor had signed no memorandum of the contract and was not himself liable

(*l*) Bird v. Bosse, 2 Ventr. 361. C. 948. Cooper v. Smith, 15 East, 103. Dobell v. Hutchinson, 3 Ad. & E. Jackson v. Lowe, 1 Bing. 9. Smith v. 355. Coe v. Duffield, 7 Moore, 252. Surman, 9 B. & C. 561. Williams v. Stead v. Liddard, 8 Id. 2. Baumann Lake, 2 Ell. & Ell. 349; 20 L. J. Q. v. James, L. R. 3 Ch. 508. B. 1.

(*m*) Kenworthy v. Schofield, 2 B. &

¹ Browne on the Statute of Frauds, § 368.

² Ib. And see Morton v. Deder, 13 Metc. (Mass.) 388; Gill v. Bicknell, 2 Cush. (Mass.) 358; McCombe v. Wright, 4 Johns. Ch. 659; Cleaves v. Foos, 4 Greenl. 1; Inhabitants v. Plummer, Id. 258; Singslaik v. Harding, 4 Harr. & J. 186; Smith v. Jones, 7 Leigh, 165; Adams v. McMillan, 9 Porter, 73; Gordon v. Sims, 2 McCord Ch. 164; Endicott v. Perry, 14 Sm. & M. 157; Anderson v. Chick, Bail. Eq. (S. C.) 118.

upon it by reason of the statute. (*n*)¹ So, if a purchaser sends an order in writing signed by him for goods, which are selected and forwarded to him, and he then declines to receive them, it is no answer to an action for not accepting and paying for the goods, to say that there was no memorandum of the contract signed by the vendor. (*o*) But, although it is not necessary that both parties should sign the memorandum, the names of the parties actually entering into the contract, must appear, on the face of the writing, as the contracting parties. (*p*) Thus, in the case of a bargain and sale of goods and chattels, it must appear, from the memorandum signed by the purchaser, that the plaintiff is the vendor; for, if that is left wholly uncertain, the memorandum will be insufficient. (*q*) And, where a price was agreed upon at the time of the sale, it must be set forth on the face of the memorandum. (*r*) Again, if the contract is a contract for the performance by the parties of mutual recurring acts and services from time to time, both must be bound by the contract, or neither can be made liable upon it, (*s*) except in respect of acts done and services

(*n*) *Hatton v. Gray*, 2 Ch. C. 164. *Fowle v. Freeman*, 9 Ves. 351. *Seton v. Slade*, 7 Ves. 264. *Laythoarp v. Bryant*, 2 Bing. N. C. 735; 3 Scott, 238.

(*o*) *Egerton v. Mathews*, 6 East, 307. *Liverpool Borough Bank v. Eccles*, 4 H. & N. 143; 24 L. J., Ex. 122. *Allen v. Bennet*, 3 Taunt. 169.

(*p*) *Williams v. Lake*, 2 Ell. & Ell. 349; 29 L. J., Q. B. 1.

(*q*) *Champion v. Plummer*, 1 N. R.

252. *Graham v. Musson*, 5 Bing. N. C. 603. *Sarl v. Bourdillon*, 1 C. B., N. 195; 26 L. J., C. P. 78. *Williams v. Lake*, 2 Ell. & Ell. 349; 29 L. J., Q. B. 1. *Vandenburgh v. Spooner*, L. R., 1 Exch. 316; 35 L. J., Exch. 201.

(*r*) *Goodman v. Griffiths*, 1 H. & N. 576; 22 Law T. R. 321. As to the requisites of the memorandum of a contract of sale, see further, post, bk. 2, chap. 1.

(*s*) *Hoddesdon Gas Company, v.*

¹ *Clason v. Bailey*, 14 Johns. 484; *McCrea v. Piermont*, 16 Wend. 460; *Penniman v. Hartshorn*, 13 Mass. 87; *Shirley v. Shirley*, 7 Blackf. 452; *Barston v. Gray*, 3 Greenl. 409; *Douglass v. Shears*, 2 Nott & McC. 207; *Morin v. Martz*, 13 Minn. 191; *Frazer v. Ford*, 2 Head. 464.

actually rendered. Thus, if a servant signs a memorandum of agreement by which he undertakes to serve his employer for more than a year, and enters upon the service, he is, nevertheless, not bound by his agreement to serve for a year, unless the memorandum is also signed by the employer; for, if the latter is not bound to employ for the term specified, the servant is not bound to serve; (*t*) but in all other respects, as regards work actually done and services actually rendered, the servant would be bound by the terms of his signed writing. (*u*)¹

In the case of a written memorandum of an agreement for a lease, if the memorandum construed in connection with other writings therein referred to, and with surrounding circumstances, leaves the commencement or the duration of the term wholly uncertain, there is no binding contract. (*x*) If a party writes a letter admitting the essential particulars of the contract, but containing a repudiation of the bargain upon bad or insufficient grounds, the letter will constitute a good memorandum of the contract within the statute. (*y*) It was formerly held that the note or memorandum of a promise to answer for the debt, default, or miscarriage of another must disclose upon the face of it the consideration for the promise; (*z*) but by the 19 & 20 Vict. c. 97, s. 3, "no such promise, being in writ-

Hazelwood, 6 C. B., N. S. 249; 28 L. J., C. P. 268.

(*t*) *Sykes v. Dixon*, 9 Ad. & E. 693.

(*u*) *Collis v. Botthamley*, Souch v. Strawbridge, 2 C. B. 808; 15 L. J., C. P. 172.

(*x*) *Bayley v. Fitzmaurice*, 8 Ell. & Bl. 679. *Fitzmaurice v. Bayley*, 27 L. J., Q. B. 143. *Clarke v. Fuller*, 16 C.

B., N. S. 24. *Nesham v. Selby*, L. R., 13 Eq. 191; 41 L. J., Ch. 551. *Baumann v. James*, L. R., 3 Ch. 508.

(*y*) *Bailey v. Sweeting*, 9 C. B., N. S. 843; 30 L. J., C. P. 154. *Wilkinson v. Evans*, L. R., 1 C. P. 407; 35 L. J., C. P. 224. *Buxton v. Rust*, L. R., 7 Ex. 279; 41 L. J., Ex. 173.

(*z*) *Powers v. Fowler*, 4 Ell. & Bl. 512.

¹ See *Sherman v. Champlain Transportation Co* 31 Vt. 162 *Trustees v. Brooklyn Fire Ins. Co.* 17 N. Y. 305.

ing and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document." The consideration, therefore, may be supplied by oral evidence, but not the nature and extent of the promise itself. (a) In the case of a guarantee, the name of the party to whom it is given must be stated on the face of the memorandum; for parol evidence is inadmissible to supply the omission. (b) But, if the writing is not strictly a guarantee—if it is a general order or authority to any person who may choose to act upon it, authorizing the supply of goods to a third party, and promising to pay for the goods so supplied—it may be sued upon as an original contract. (c)

214. *Of the signature to the memorandum.*—If a man writes his name in the first person, as, "I, James Crockford, agree," &c., (d) or in the third person, as, "Mr. Stanley agrees," (e) this is a sufficient signature. But the mere insertion of the name of the contracting party in the body of a written contract is not, of itself, a sufficient signature. For, though the signature need not be placed in any particular part of the instrument yet it must be so introduced as to govern or authenticate every material and operative part of it. (f) Therefore, where the defendant, Moore, wrote instruc-

(a) *Holmes v. Mitchell*, 7 C. B., N. S. 361; 28 L. J., C. P. 301.

(b) *Williams v. Lake*, 29 L. J., Q. B. 1.

(c) *M'Kune v. Joynson*, 5 C. B., N. S. 218; 28 L. J., C. P. 133.

(d) *Knight v. Crockford*, 1 Esp. 190.

Taylor v. Dobbins, 1 Str. 399. *Proper v. Parker*, 1 Russ. & Myl. 625.

Bleakly v. Smith, 11 Sim. 150.

(e) *Lobb v. Stanley*, 5 Q. B., 574.

Johnson v. Dodgson, 2 M. & W. 653.

(f) *Caton v. Caton*, L. R. 2 H. L.

127. *Ogilvie v. Foljambe*, 3 Mer. 53

tions for a lease, to the plaintiff in these words: "The lease renewed; Mrs. Stokes to pay the king's tax, also to pay Moore £24 a year, half yearly; Mrs. Stokes to keep the house in good and tenantable repair," &c., it was held that Moore, by writing his own name in the body of the instructions, had not signed an agreement for the renewal of the lease within the intent and meaning of the statute. (*g*) If the agreement concludes "as witness our hands," or contains any words showing that the names of the contracting parties were to be subscribed, there is no signing within the statute, unless the names of the parties are duly subscribed at the foot of the instrument. (*h*)

The civil law did not require the signature of a party to a written contract, if the contract was in his own handwriting. (*i*) But in our own law, if the defendant has written the whole contract with his own hand, without signing it as a concluded agreement, this is not sufficient, as the statute has made signing absolutely necessary for the completion of the contract. (*k*) A party may, under certain circumstances, be bound by his signature, although he subscribed in form, as a witness. (*l*) "What, within the legal intent of the statute, will amount to a signing, is the same question in equity as at law." (*m*) Where an offer was accepted by the defendant by telegram, and the instructions for the message were signed by the defendant, and the telegram received by the plaintiff contained the message with the names of the sender and receiver written by the telegraph clerk on the

(*g*) *Stokes v. Moore*, 1 Cox. 222, 223.

(*h*) *Hubert v. Treherne*, 3 M. & Gr. 743; 4 Sc. N. R. 486.

(*i*) *Instit. lib. iii. tit. 24.*

(*k*) *Ithel v. Potter*, cited 1 P. Wms.

(*l*) *Welford v. Beezely*, 1 Ves. senr.

6. *Gosbell v. Archer*, 2 Ad. & E. 508; 4 N. & M. 494.

(*m*) *Morison v. Turnour*, 18 Ves.

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usual printed form, it was held that there was a sufficient signature within the statute. (*n*) If a man writes his name in the vendor's order-book, intending it as an order or authority to the vendor to send him certain goods specified therein, with the prices, this is a sufficient signature. (*o*) So, if he writes his name against an entry or memorandum in a book or ledger, or indorses his name on printed particulars of sale, printed handbills, or printed descriptions, specifying the goods and the price, with intent to denote that he has purchased the contents, this is a sufficient signature; and the name may be written in pencil as well as in ink. (*p*) A man may sign, also, by his initials, or by his mark, (*q*) or by a stamp; (*r*) and it is quite immaterial upon what part of the paper the mark or signature is to be found. But the signature must, of course, be made with a view of authenticating the document as a concluded contract; and not with a view, merely, of altering or settling a draft, or approving of propositions and proposals not finally arranged and decided upon. (*s*) A written admission, by a purchaser to his agent, that he had bought certain goods for him, is a sufficient note or memorandum of the bargain between him and the vendor. (*t*)¹

(*n*) *Godwin v. Francis*, L. R., 5 C. 780. *Jacob v. Kirk*, 2 Mood. & Rob. P. 295; 39 L. J., C. P. 121. 221.

(*o*) *Sarl v. Bourdillon*, *ante*, p. 322. (*r*) *Bennett v. Brumfit*, 37 L. J., C. Newell v. Radford, 37 L. J., C. P. 1; P. 25.

L. R., 3 C. P. 52. (*s*) *Coldham v. Showler*, 3 C. B.

(*p*) *Geary v. Physic*, 5 B. & C. 234; 320. *Hawkins v. Holmes*, 1 P. Wms. 7 D. & R. 653. 770. *Doe v. Pedgriph*, 4 C. & P.

(*q*) *Hubert v. Moreau*, 12 Moore, 312.

219. *Phillimore v. Barry*, 1 Camp. (*t*) *Gibson v. Holland*, L. R. 1 C.

513. *Hyde v. Johnson*, 2 Bing. N. C. P. 1; 35 L. J., C. P. 5.

¹ Various modes of signing instruments in writing have at different times prevailed. Prior to the Normans in England, a signature is supposed to have been held necessary to authenticate an instrument. The use of seals was introduced be-

215. *Signature by agents.*—Where the note or memorandum is signed by an agent, it is not necessary that the agent should obtain his authority by any written instrument. It has been held, consequently, that the name of the party sought to be charged, printed by a printer in particulars of sale, or in any other printed paper embodying the terms of the contract, cause the people, as a rule, could not write. In some countries, in quite recent times, the scrawl or scroll, made with the pen underneath the name of a signer (originating in the cross, or sign of the cross), was held to constitute the validity of the signature; and to counterfeit that, and not the signature, was held a forgery. Then the affixing of seals to instruments, as requiring more leisure, and indicating more deliberation, gradually came to be a ceremony of a more solemn nature than a mere signing, and to impart that solemnity to the instrument. A mark is as good as a signature (*Jackson v. Van Dusen*, 5 Johns. 144). And, if the custom so appear to be, a printed signature is the same as a written one (*Lerned v. Wannemacher*, 9 Allen, 417; *Commonwealth v. Ray*, 3 Gray, 447). But in the state of New York (R. S. 1859, vol. iii. part ii. ch. vii., title 1, §§ 6, 7, 8, 9, 10, see *post*), whose statute uses the word "subscribed," instead of the word "signed," it has been expressly held that actual manual subscription in writing is necessary, and that a printed signature is not sufficient (*Vielie v. Osgood*, 8 Barb. 132; *Davis v. Shields*, 26 Wend. 361). As to whether this statute would be satisfied by a signer's stamping or manually impressing his name, there seems to be no express decision. And as to the place and means of signature, see *Hawkins v. Chase*, 19 Pick. 502; *Yerby v. Grigsby*, 9 Leigh, 387. In the state of New York the signature must be at the foot (*James v. Patton*, 2 Seld. 9; *Meehan v. Rowke*, 2 Bradf. 385; *Campbell v. Logan*, Id. 90; *Morris v. Kniffin*, 37 Barb. 336; *Barnard v. Heydrick*, 49 Id. 62; *Merritt v. Clason*, 12 Johns. 112; 14 Id. 484; *Zachrisson v. Poppe*, 3 Bosw. 171). And a signature by telegraph, it seems, will be a sufficient signature (*Dunning v. Roberts*, 35 Barb. 463). One may authorize another to sign in his presence (*Williams v. Woods*, 16 Md. 220). A substantial signing, although not literal and formal, is sufficient, as where the hand is guided by another (*Stevens v. Van Cleve*, 4 Wash. C. C. 262); even if no express request for assistance is proved. *Vandruff v. Rinehart*, 29 Pa. St. 232.

tract, may be a signature by "a person lawfully authorized" within the meaning of the statute. If the party has recognized and adopted his printed name or signature—if, for instance, he has sanctioned or permitted the distribution of printed handbills, or printed particulars of sale, in which his name appears—there has been a signature by an agent duly authorized, upon the principle that the subsequent sanction or adoption of the printed name or signature is equivalent to an antecedent authority to the printer to print it. (*u*) If an agent has signed a contract without authority, and the principal subsequently adopts the contract or ratifies the transaction, he is bound by the agent's signature. (*x*) But the mere introduction of a name into a written or printed paper, unrecognized by the party, and not brought home to him as having been written or printed by his authority, is, of course, no signature within the meaning of the statute. (*y*)¹ A mere clerk or traveler of one party cannot be treated as an agent to bind the other, unless it be shown that he has received specific and express authority so to do. (*z*) One of two or more partners may bind the others by signing the customary trading name of the firm to contracts for the purchase and sale of articles usually dealt in by the firm in the course of its business. (*a*)

(*u*) *Schneider v. Norris*, 2 M. & S. 288. *Maclean v. Dunn*, 1 Moo. & P. 766. *Saunderson v. Jackson*, 2 B. & P. 238.

(*x*) *Fitzmaurice v. Rayley*, 6 E. & B. 868; 26 L. J., Q. B. 114. *Bigg v. Strong*, 4 Jur. N. S. 983.

(*y*) *Hubert v. Turner*, 4 Sc. N. R. 506; 3 M. & Gr. 343.

(*z*) *Graham v. Musson*, 7 Sc. 769. *Graham v. Fretwell*, 4 Sc. N. R. 25. *Blore v. Sutton*, 3 Mer. 245. *Durell v. Evans*, 1 H. & C. 174; 31 L. J. Exch. 337.

(*a*) *Norton v. Seymour*, 3 C. B. 792

¹ *Lerned v. Wannemacher*, 9 Allen, 417; but this is influenced by custom. See *Merritt v. Classon*, 12 Johns. 102; 14 Johns. 484; *Zachrisson v. Poppe*, 3 Bosw. 171; and note 1, p. 327.

An auctioneer effecting a sale by auction, or an auctioneer's clerk taking down the biddings in the presence of the purchaser, is, during the continuance of the sale, but no longer, (*b*) the authorized agent of the vendor and purchaser, and is enabled to sign for both or either of the parties, so as to satisfy the statute of frauds; (*c*) and so is a broker who is employed to sell goods, and who signs and delivers bought and sold notes. (*d*) Neither of the contracting parties themselves can be the agent of the other for such a purpose; (*e*) the agent contemplated by the legislature, who is to bind a defendant by his signature, must be some third person; and an auctioneer who signs the defendant's name by his authority cannot afterwards sue the latter upon the contract authenticated by such signature. (*f*) If the signature was made by the auctioneer's clerk, the auctioneer may then sue upon the contract. (*g*) The agency of an auctioneer, and his authority to bind the bidder by his signature, may be rebutted by showing a contract between the vendor and the bidder inconsistent with such agency. Thus, where goods were directed to be sold at auction by an executor, and the latter, before the sale, agreed with a legatee that he might bid at the sale any amount under £200, and that the price should be set off against the legacy, and the legatee accordingly attended and became the purchaser of goods to the amount of £145, and his name was written down on the conditions of sale by the auctioneer, it was held that the auctioneer was not, under the circumstances, an agent

(*b*) *Mews v. Carr*, 1 H. & N. 488; 26 L. J., Exch. 39.

(*c*) *Hinde v. Whitehouse*, 7 East, 568. *Emmerson v. Heelis*, 2 Taunt.

38 *White v. Proctor*, 4 Id. 209. *Bird v. Boulter*, 4 B. & Ad. 447.

(*d*) *Rucker v. Cammeyer*, 1 Esp. 104.

(*e*) *Wright v. Dannah*, 2 Campb. 203. *Sharman v. Brandt*, L. R., 6 Q. B. 720; 40 L. J., Q. B. 312.

(*f*) *Farebrother v. Simmons*, 5 B. & Ald. 33.

(*g*) *Bird v. Boulter*, 4 B. & Ad. 443 1 N. & M. 313.

to bind the legatee so as to render the latter responsible for the non-payment of the price according to the terms of the conditions. (*h*)¹

216. *Unconscientious use of the statute of frauds.*—Where, by the fraud of one of the parties to a contract, it has not been reduced into writing, he will not be allowed to set up the statute. (*i*)

217. *Confirmation of promises made by infants.*—By the 9 Geo. 4, c. 14, s. 5, every promise made, after full age, to pay any debt contracted during infancy, and any ratification, after full age, of any promise or simple contract made during infancy, must be in writing, signed by the party to be charged therewith. (*k*)

218. *Executory promises requiring authentication by deed.*—All unilateral or one-sided undertakings and engagements, where there is no mutuality of contract, and nothing is given or agreed to be done, and nothing has been done, as the consideration or inducement for the promise, must be authenticated by deed in order to enable the promisee to maintain an action for the non-performance of them. Thus, as we have already seen, if one man promises another to build him a house or to render him some certain service, and nothing is to be given or done by the promisee for the building or the service, no action lieth upon the promise; but, if the promise be made by deed, an action of covenant is maintainable upon the deed; and the consideration cannot then be inquired into.²

219. *Authentication of leases.*—By the act 10

(*h*) *Bartlett v. Purnell*, 4 Ad. & E. 792. Lord Glengall *v.* Barnard, 1 Kee. 769.

(*i*) *Lincoln v. Wright*, 4 D. & J. 20. Haigh *v.* Kaye, L. R. 7 Ch. 469.

(*k*) *Ante*, p. 247.

¹ As to auctioneers, see *ante*, note 2, p. 41, and *Gill v. Bicknall*, 2 Cush. 355; *Horton v. McCarty*, 53 Me. 394; *Smith v. Arnold*, 5 Mass. (C. C.) 419.

² *Ante*, pp. 6–9.

amend the law of real property (8 & 9 Vict. c. 106, s. 3) it is enacted that a lease, required by law to be in writing, (*l*) of any tenements or hereditaments, and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, and a **surrender in writing of an interest in any tenements or hereditaments**, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the 1st day of October, 1845, shall be void at law unless made by deed. It has been held that this statute refers only to legal estates, so that an equitable interest, such as an equity of redemption, may be assigned by a note or memorandum in writing without being under seal. (*m*) Nor does it apply to agreements to let tolls, which are regulated by the 3 Geo. 4, c. 126, and are valid if signed by the trustees, their clerk, or treasurer, notwithstanding they are not under seal. (*n*) And a lease by simple contract for a term exceeding three years in duration, though void as a lease, will operate as an agreement to grant a lease for the term specified, (*o*)

(*l*) By the Statute of Frauds (29 Car. 2, c. 3, s. 1), "all leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seizin only, or by parol, and not put into writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, except (s. 2) all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-thirds part at the least of the full improved value of the thing de-

mised;" and (s. 3) "no leases, estates, or interest, either of freehold, or term of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements or hereditaments, shall be assigned, granted or surrendered unless it be by DEED, or note in writing signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law."

(*m*) *Stamers v. Preston*, 9 Ir. C. L. R. 355, C. P.

(*n*) *Shepherd v. Hodsman*, 18 Q. B. 316; 21 L. J., Q. B. 263.

(*o*) *Bond v. Rosling*, 30 L. J., Q. B. 227. *Drury v. Macnamara*, 5 Ell. &

and may be specifically enforced; (*p*) and a lease or agreement for a lease void as to the duration of the lease may regulate the terms upon which the tenancy subsists in other respects. (*q*)

The authority of an agent to make or execute a deed for his principal, must be under seal, (*r*) except in the case of joint-contractors, one of whom it has been held, may execute a deed for himself and the others without an authority under seal, provided he execute the deed for himself and others in the presence of the others. (*s*)¹

Bl. 616; 25 L. J., Q. B. 5. *Tidey v.*
Mollett, 16 C. B., N. S. 308; 33 L. J.,
C. P. 235.

(*p*) *Parker v. Taswell*, 2 De G. & J.
559; 27 L. J., Ch. 812.

(*q*) *Doe v. Bell*, 5 T. R. 471. *Rich-*
ardson v. Gifford, 1 Ad. & E. 52.

Arden v. Sullivan, 14 Q. B. 823; 19
L. J., Q. B. 268. *Tooker v. Smith*, 1
H. & N. 732. *Tress v. Savage*, 4 Ell.
& Bl. 43; 23 L. J., Q. B. 339.

(*r*) *Steigiltz v. Eggington*, 1 Holt,
141.

(*s*) *Ball v. Dunsterville*, 4 T. R. 313.

¹ *Cummings v. Cassilly*, 5 B. Mon. 75; *McNaughton v.*
Partridge, 11 Ohio, 223; *Blood v. Goodrich*, 9 Wend. 68; *Id.*
12; *Id.* 525.

The English statute of frauds is contained in 29 Car. II.
cap. iii. §§ 1, 2, 3, 4, 7, 8, 9, 17; 9 Geo. IV. cap. xiv.; §§ 5, 6, 7; 19 &
20 Vict. 1856 (Mercantile Law Amendment Act); and in the
United States the statute will be found in the various states as
follows:

Alabama—Revised Code (Walker) 1867, §§ 1590, 1591; 1862,
1863, 1864, 2599.

Arkansas—English's Digest, ch. lxxiii. §§ 1, 2, 10, 11, 12, 13.

California—General Laws (Hittell), paragraph 3150 et seq.;
parts of chs. i. ii. iii. §§ 6, 7, 8, 9, 10, 12, 13, 14, 19, 21, 25.

Colorado—Revised Statutes, 1868, ch. xxxvii. §§ 6-13, 16, 17, 18.

Connecticut—General Statutes, Revision of 1866, title xxxvii.
ch. i. §§ 10, 24; title xxv. §§ 1, 2.

Delaware—Revised Code, 1852 (as amended, 1874), title ix.
ch. lxiii. §§ 5, 6, 7; title xvii. ch. cxx. § 3.

Florida—Thompson's Digest, 1847, second division, title i.
cap. i. §§ 1, 2, 3; second division, title iv. cap. iii. §§ 1, 2.

Georgia—All sections of the English statute in force. See
the various titles; also T. R. Cobbs' New Digest, App. III.

Illinois—Revised Statutes, 1874, ch. lix. §§ 1, 2, 9.

Indiana—Revised Statutes, 1852 (Gavin & Hord), 2nd ed. vol. i. 1870, ch. lxvi. §§ 1-7.

Iowa—Code, 1873, §§ 1933, 3663, 3666.

Kansas—Compiled Laws, 1868, ch. xxxiv. §§ 4, 5.

Kentucky—General Laws, 1873 (Bullock & Johnson), ch. xxiv. § 3; ch. xxii. §§ 1, 2.

Louisiana—In this state the civil law prevails. Morgan's Civil Code of Louisiana, art. 1772, et seq.; art. 3004, et seq.; Ringgold v. Newkirk, 3 Ark. 96.

Maine—Revised Statutes, 1871, title vii. ch. lxxiii. §§ 10, 11, p. 562; title ix. ch. iii. §§ 1, 2, 3, 4, p. 786.

Maryland—All sections of the English statutes in force. See the various titles; also, Alexander's Kilty's Report of English Statutes, art. Statute of Frauds.

Massachusetts—General Statutes, 1860, part ii. title i. ch. lxxxix.; title iv. ch. c.; title vi. ch. cv.; ch. iii. § 7, clause 20.

Michigan—Compiled Laws, 1871, title xxvii. ch. clxvi. §§ 6, 7, 8, 9, 10; title xxvii. ch. clxvii. §§ 2, 3, 4, 5, 6.

Minnesota—Statutes at Large, 1873, ch. xxxvi. title ii. §§ 6, 7, 8, 9, 10, 11, 12, 13.

Mississippi—Revised Code, 1871, ch. lx. art. i. §§ 2892, 2895, 2896, 2897, 2898.

Missouri—Wagner's Missouri Statutes, 1872, ch. lxii. vol. i. p. 655.

Nebraska—General Statutes, 1873, ch. xxv. §§ 8, 9, 10, 18, 24, 25.

—Laws, 1861, ch. ix. §§ 55-59, 61, 62, 63, 70.

New Hampshire—General Statutes, 1867, ch. cxxi. §§ 12, 13; cci. §§ 12, 13, 14.

New Jersey—Revised Statutes, 1874, title Frauds; An Act for the Prevention of Frauds and Perjuries, p. 299.

New York—Revised Statutes, 1859, vol. iii. part. ii. ch. vii. title i. §§ 6, 7, 8, 9, 10. (As amended, Laws of 1863, ch. cccxxii. p. 567); title ii. §§ 2, 3, 4; Laws of 1863, ch. ccclxiv. p. 802.

North Carolina—Battle's Revisal, 1873, ch. l. §§ 8, 10.

Ohio—Revised Statutes (Swan & Critchfield's ed.), 1870, ch. xlvii. §§ 4, 5.

Oregon—Organic and General Laws, 1843-1872 (Civil Code), title viii. ch. viii. §§ 771, 772, 775, 776.

Pennsylvania—(Erightley's Purdon), 10th ed. 1872, vol. i. p. 723.

Rhode Island—General Statutes, 1872, title xxvi. ch. cxcii. § 8; title xxii. ch. clxi. §§ 1, 2.

South Carolina—All sections of the English statutes in

force. See the various titles; also Brevard's Digest, vol. i title lxxxiv.

Tennessee—Statutes (Thompson & Steger), 1871, vol. i. § 1758.

Texas—Paschal's Annotated Digest, 1873, 3d ed. vol. i. arts. 3875, 3876, p. 649.

Vermont—General Statutes, 1862, ed. 1870, title xix. ch. lxiv. §§ 21, 22, 23, 24; title xx. ch. lxvi. §§ 1, 2, 3, 4.

Virginia—Code (3rd ed. Munford), 1873, ch. cxi. §§ 1, 2.

West Virginia—See Virginia.

Wisconsin—Revised Statutes (Taylor), 1872, title xx. ch. cvi, §§ 6, 7, 8, 9, 10; title xx. ch. cvii, §§ 2, 3, 4, 8.

Canada—See Consolidated Statutes for Upper Canada, 1859, p. 452.

CHAPTER II.

OF THE INTERPRETATION OF CONTRACTS

SECTION I.

GENERAL PRINCIPLES OF INTERPRETATION.

220. *Of the construction of contracts.*—Every contract ought to be so construed that no clause, sentence, or word shall be superfluous, void, or insignificant. Every word ought to operate in some shape or other; nam verba debent intelligi cum effectu ut res magis valeat quam pereat.¹ One part must be so construed with another that the whole may, if possible, stand; but a clause or particular sentence totally repugnant to the general intent of the contract is void, and must be rejected. (a)² The terms of the

(a) Parkhurst v. Smith, Willes, 332. Hoskins, Winch. 93. Domat's Civil Solly v. Forbes, 4 Moore, 463. Eyston Law, l. 1, tit. 1, § 2, xi. Shep. Touch. v. Studd, Plowd. 465. Trenchard v. 88.

¹ The words should rather have that significance which will preserve, than that which will destroy the instrument.

² Id. Every instrument is to be interpreted by a consideration of all its provisions, and its obvious design is not to be controlled by the precise form or force of single words. The intention of the parties must govern. Tabb v. Archer, 3 Hen. & M. 399; Stewart v. Preston, 1 Fla. 10; Stout v. Whitney, 12 Ill. 218; District, &c. v. Dubuque, 7 Iowa, 262; Thompson v. Kelso, 3 La. Ann. 578; Goosey v. Goosey, 48 Miss. 416; Tucker v. Meeks, 2 Sweeny (N. Y.) 736; Herst v. De Comeau, 1 Id. 590; Kimball v. Brawner, 47 Mo. 398; St. Louis Gas-

contract "are to be understood in their plain, ordinary and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words." (b) Technical words of law, however, are to have their legal effect, unless from subsequent inconsistent words it is very clear that the parties used them in a sense different from their legal meaning; and the ordinary grammatical construction is to be followed, unless it is repugnant to the general context of the written instrument. (c) If the parties have used technical terms and words of art, unintelligible to the ordinary reader, but having a clear, distinct, and definite meaning amongst mechanics or merchants, extrinsic evidence of such meaning may be given in aid of the interpretation of the deed, and to give the words their proper and known signification. (d) Bad spelling is of no consequence, so long as it appears with certainty what is meant. (e)¹

(b) Lord Ellenborough, *Robertson v. French*, 4 East, 137. *Mallan v. May*, 13 M. & W. 511. *Scott v. Bourdillon*, 5 B. & P. 213.

(c) *Lees v. Mosley*, 1 You. & C. 607. *Elliott v. Turner*, 2 C. B. 446.

(d) *Goblett v. Beechy*, 3 Sim. 24.

(e) *Hulbert v. Long*, Cro. Jac. 607. *Osborn's case*, 10 Co. 130, a. 2 Roll. Abr. 147.

light Co. v. St. Louis, 46 Id. 121; *Scott v. Glaze*, 29 Iowa, 168; *Corbett v. Berrynell*, 27 Id. 157; *Taliaferro v. Cundiff*, 33 Tex. 415; *Fire Ins. Co. v. Doll*, 35 Md. 79; *Appleman v. Fisher*, 34 Id. 540; *Groot v. Story*, 44 Vt. 540; *Henderson v. Rost*, 5 La. Ann. 467; *Peck v. Bemiss*, 10 Id. 160; *McKie v. N. O. & C. R. R. Co.* 16 Id. 79; *Chase v. Bradley*, 26 Me. 531; *Barnum v. Thurston*, 17 Md. 470; *Merritt v. Gore*, 29 Me. 346; *Rose v. Roberts*, 9 Minn. 119; *Knower v. Emerson*, 9 Pick. 422; *Wheelock v. Freeman*, 23 Id. 167; *Haywood v. Perrin*, 10 Id. 230; *Springsteen v. Samson*, 32 N. Y. 703; *Swisher v. Grumbles*, 18 Tex. 164; *Gray v. Clark*, 11 Vt. 583; *Kelly v. Mills*, 8 Ohio, 325; *Patrick v. Grant*, 14 Me. 233.

¹ And see, as to grammatical construction, *Morey v. Homan*,

221. Evidence of surrounding circumstances.—

To enable us also to arrive at the real intention of the parties, and to make a correct application of the words and language of the contract to the subject-matter thereof, and the objects professed to be described, all the surrounding facts and circumstances may be taken into consideration. The law does not deny to the reader the same light and information that the writer enjoyed; he may acquaint himself with the persons and circumstances which are the subjects of the allusions and statements in the writing, and is entitled to place himself in the same situation as the party who made the contract, to view the circumstances as he viewed them, and so judge of the meaning of the words and of the correct application of the language to the things described. (*f*) Where a lease had been made, by the plaintiff, to the defendant of part of a messuage, together with a piece of ground thereunto adjoining, which piece of ground was used as a yard, and beneath the yard was a cellar occupied by a third party under a lease previously granted to him by the plaintiff, and the occupant of the cellar continued to reside in it, and to pay rent to the plaintiff, for three or four years after the latter had demised the yard to the defendant, but, his lease having expired and he having quitted the cellar, the defendant took possession of it, contending that the cellar had passed to him by the demise of the yard, the court held that

(*f*) *Shaw v. Wilson*, 9 Cl. & Fin. 110; 7 C. B., N. S. 305. *Carr v. 555, 569. Macdonald v. Longbottom, Montefiore*, 5 B. & S. 408; 33 L. J., 29 L. J., Q. B. 256; 1 El. & Bl. 987. Q. B. 256. *Mumford v. Gething*, 29 L. J., C. P.

10 Vt. 565. It makes no difference in the responsibility for a libel that it is badly spelled, or expressed in initials. See *Morgan's Law of Literature*, vol. i. p. 165.

parol evidence of the surrounding circumstances was admissible to show that it did not pass. (*g*)¹

222. *Latent ambiguity*.—From the admission of such evidence, and from bringing the words of the writing into contact with surrounding circumstances, a doubt sometimes arises as to the correct application of the words to the subject-matter of the contract and the objects professed to be described; this is called a latent ambiguity, because it is not apparent upon the face of the contract, but arises from the application of the words to the objects to which they refer. "As this difficulty or ambiguity is introduced solely by the admission of extrinsic evidence of surrounding circumstances, it may be rebutted and removed by the production of further evidence of the identity of the objects described, in accordance with the ancient maxim, '*ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.*'" (*h*)² But the judgment of the court in expounding a deed must be simply declaratory of what is in the deed; it has to ascertain, not what the

(*g*) *Doe v. Burt*, 1 T. R. 703. Press 1 M. & Sc. 345. Bac. Max. 23. *Doe v. Parker*, 10 Moore, 158. Wigram, v. Needs, 2 M. & W. 140. *Doe v. on Evidence*, 53, 76, 83, 3rd ed. *Doe* Hiscocks, 5 M. & W. 368. *Raffles v. v. Hubbard*, 20 L. J., Q. B. 67. *Wichelhaus*, 33 L. J., Ex. 160; 2 H.

(*h*) *Tindal v. C. J.*, *Miller v. Travers*, & C. 906.

¹ *Dent v. North American, &c. Co.* 49 N. Y. 390; *Von Keller v. Schulling*, 50 Id. 104; *Green v. Day*, 34 Iowa, 328; *Woodruff v. Woodruff*, 32 N. Y. 53; *Smith v. Velson*, 33 Iowa, 24; *Walls v. Bailey*, 49 N. Y. 464; *Akin v. Drummond*, 24 La. Ann. 92; *Strong v. Gregory*, 19 Ala. 146; *The Ida, Dav.* 407; *Lemmons v. Flanakin*, 1 Hempst. 32; *State v. Conklin*, 34 Wis. 21; *Parker v. Amazon Ins. Co.* Id. 362; *Montgomery v. Firemen's Ins. Co.* 16 B. Mon. (Ky.) 427; *Murray v. Corothers*, 1 Metc. (Ky.) 267.

² A latent ambiguity may be explained by evidence, or an ambiguity which arises by proof of an extrinsic fact, may, in the same manner, be removed.—*Broom. Leg. Max.* 608.

party intended, as contradistinguished from what the words express, but what is the meaning of the words he has used. (*i*) And, "when the words of any written instrument are free from any ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or to the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, and common meaning of the words themselves; and evidence dehors the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties, is utterly inadmissible." (*k*)¹

223. Patent ambiguity.—Where, by an ambiguity patent on the face of the instrument, the intention of the parties is left in doubt, parol evidence is inadmissible to remove it. (*l*) If a blank, for instance, has been left in a deed, or an important clause or word has been omitted by mistake, and it is doubtful what word was intended to have been used, the defect cannot be cured by extrinsic evidence of what was intended to have been inserted. (*m*) Evidence merely explanatory of what the party has written is admissible, but not to show what he intended to have written. (*n*)

(*i*) *Clayton v. Ld. Nugent*, 13 L. J., Ex. 365; 13 M. & W. 200.

(*k*) *Tindal, C. J., Shore v. Wilson*, 9 Cl. & Fin. 565, 566. *Jones v. Newman*, 1 W. Bl. 60.

(*l*) *Tindal C. J., Sanderson v. Piper*, 7 Sc. 415; 5 Bing. N. C. 431.

(*m*) *Baylis v. Church*, 2 Atk. 239. *Hunt v. Hart*, 3 Br. C. C. 311.

(*n*) *Divinatio non interpretatio est quæ omnino recekit a litera.* Bac. Tracts, fol. 47. *Miller v. Travers*, 1 M. & Sc. 347. *Clayton v. Ld. Nugent*, *Shore v. Wilson*, *supra*.

¹ See *Morris v. Edwards*, 1 Ohio, 189; *Cabot v. Wendson*, 11 Allen, 546; *Hinneman v. Rosenback*, 39 N. Y. 98; *Richardson v. Beede*, 43 Me. 161; *Brown v. Cambridge*, 3 Allen, 474; *Buswell v. Poiner*, 32 N. Y. 312; *Eaton v. Alger*, 2 Keyes, 41; *The Lady Franklin*, 8 Wall. 325; *Tucker v. Maxwell*, 11

But, if the ambiguity arises simply from an imperfect expression of the meaning of the party, and can be resolved by reference to the general context of the instrument, when brought into contact with surrounding circumstances, the court will aid the imperfect expression in favor of the manifest intention, and will draw all such plain and reasonable inferences from the language and general context of the deed as appear to be necessary to give effect to the obvious meaning, and to carry into execution any matter or act clearly contemplated and intended to be done. (o) If an important word has been omitted by mistake, and it clearly appears from the general context of the instrument, and the light thrown thereon by surrounding circumstances and the nature of the transaction, what the parties really meant and intended, the courts in furtherance of the obvious intent, will read and construe the deed as if the word had been duly inserted. (p)¹ Where the name of the obligee of a bond was omitted in the obligatory part of an instrument, and it did not consequently there appear to whom the obligor had become bound, but it afterwards appeared, from the condition, who he was, the bond was held good by reference to the condition, and was construed as if no such clerical error had occurred. (q) So, where

(o) *Sampson v. Easterby*, 9 B. & C. 505; 4 M. & R. 422. *Saltoun v. Phipps v. Tanner*, 5 C. & P. 488. *Houston*, 1 Bing. 433; 8 Moore, 546. *Jarvis v. Wilkins*, 7 M. & W. 410. *Bache v. Proctor*, 1 Doug. 383. (p) *Coles v. Hulme*, 8 B. & C. 568. (q) *Langdon v. Goole*, 3 Lev. 21.

Mass. 143; *Johnson v. Johnson*, Id. 359, 363; *Johnson v. Weed*, 9 Johns. 310; *Delaney v. Townes*, 1 Allen, 407; *Wilkinson v. Scott*, 17 Mass. 249; *Putnam v. Lewis*, 8 Johns. 389; *City Bank v. Adams*, 45 Me. 455; *Billings v. Billings*, 10 Cush. 178; *Shaw v. Shaw*, 50 Me. 94; *Parker v. Syracuse*, 31 N. Y. 376; *Nichols v. Williams*, 7 C. E. Green, 63; *Young v. Gregory*, 46 Me. 475; *Gould v. Norfolk Lead Co.* 9 Cush. 338; *Rogers v. McPheters*, 40 Me. 114; *Whitney v. Slayton*, 40 Id. 224.

¹ And see *Wright v. Day*, 33 Wis. 260.

the name of the grantor had been omitted in the operative part of a grant, but it clearly appeared from another part of the deed who he was, the deed was held to be valid, and was carried into full operation. (r) A deed, therefore, will not, in such cases, be construed to be of no effect; nam benignæ faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat. (s) The words "covenant" and "condition," when used in an agreement, do not necessarily mean a covenant under seal, or a condition in the strict legal sense of the word, but may, in order to effectuate the intention of the parties, be construed to mean contract or stipulation. (t)¹

224. *Figures and words at length.*—The import and meaning of words at length cannot be contradicted or altered by figures. Where the figures and the words of a bill of exchange or promissory note, for example, disagree, the courts will give force to the words at length, in preference to the figures, "because a man is more apt to commit an error with his pen in writing a figure than he is in writing a word." (u)²

225. *Repugnant and void limitations of liability.*—If a man covenants in his own name for the performance of some particular act or duty, and then

(r) Say (Lord) and Sele's case, 10 Knight, 6 Ell. & Bl. 805; 26 L. J., Q. Mod. 46. B. 30.

(s) Platt on Covenants, Ch. 2 Bac. (t) Hayne v. Cummings, 16 C. B., Abr. (Covenant), Fazakerley v. Mc- N. S. 421.

(u) Sanderson v. Piper, 7 Sc. 415.

¹ *Ante*, notes 1 and 2, p. 335, and see Blossburg & Corning R. R. Co. v. Tioga R. R. Co. 1 Keyes, 486; Fenderson v. Owen, 54 Me. 372. Ambiguity of language, however, is to be distinguished from unintelligibility and inaccuracy, such as may render a contract void. Story on Cont. § 830; Young v. Gregory, 46 Me. 475; Nichols v. Williams, 7 C. E. Green, 63, and cases cited.

² And see Dane v. Derber, 28 Wis. 216.

seeks by proviso to relieve himself from all liability upon the covenant, the proviso will be rejected as being repugnant to the covenant. (x) If two persons make a grant by deed, and it is provided that the deed shall not charge one of the grantors, the proviso is void; for it restrains all the effect of the grant as against him. (y) If a company authorizes its agent to issue bills of exchange with restricted liability as regards the shareholders, such restriction of liability is repugnant and void. (z) Where by indenture the defendants covenanted for themselves and their successors, churchwardens, &c., with the plaintiff, that they, the said churchwardens, &c., and their successors, would pay to the plaintiff a certain sum of money by installments, but it was provided that nothing contained in the said indenture should be deemed, or construed to be, any personal covenant of, or obligation upon, the defendants, or in anywise personally affect them, their goods, effects, or estates, but should be binding upon the churchwardens and overseers of the poor of the said parish, and their successors for the time being, it was held that, as the defendants could not covenant so as to bind their successors, the covenant was their own personal covenant, and that the proviso, being in direct contradiction to the covenant, and utterly inconsistent with any personal liability of any kind whatever upon it, must be rejected as repugnant. (a)

226. *Limitation of liability to a particular fund.*
—But, when a covenant has been entered into for the payment of money, a proviso by the same deed exonerating the covenantor from all liability upon the covenant is not nugatory, if a particular fund is

(x) Jenk. Cent. 96, pl. 86.

(s) State Fire Ins. Co., in re, 32 L.

(y) Bro. Abr. CONDITIONS, pl. J., Ch. 300.

238.

(a) Furnivall v. Coombs, 6 Sc. N.

R. 522.

charged with the payment of the money. In the case of covenants to pay an annuity, if the land of the covenantor is charged with the payment, a proviso exonerating the person and personalty of the grantor is good ; and Lord Coke, in commenting upon s. 220 in Littleton, says, "It appeareth that when in a general grant the law doth give two remedies, the grantor may provide that the grantee shall not use one of them, and so leave the party to the other. But, where the grantee hath but one remedy, there that remedy cannot be barred by any proviso ; for such a proviso would be repugnant to the grant." Consequently a proviso restricting the liability, good at the beginning, may become repugnant and void, as, if a man by deed grants a rent for life issuing out of his land, with a proviso that it shall not charge his person, this is a good proviso ; yet, if the rent is in arrear, and the grantee dies, his executors shall charge the person of the grantor in an action of debt ; for otherwise they would be without remedy ; and therefore the proviso is now become repugnant, and, by consequence, void. (b) Covenants to pay out of a particular fund do not of necessity imply that the payment is not to be made unless the fund is raised, and do not therefore make the contract conditional and contingent on the realization of the fund. Such a covenant is an absolute covenant to pay the money, unless there is an express limitation of the liability. (c)

In the case of simple contracts, however, where the party has looked to the anticipated realization of funds by projectors of a particular undertaking, and not to the personal liability of the parties with whom

(b) *Sir Anthony Mildmay's case*, 6 Co. 41, b.

Pilbrow v. Pilbrow's Co. 5 C. B. 472. *Sund. Marine Ins. Co. v. Kearney*, 20

(c) *Bain v. Kirk*, 18 L. J., Q. B. 83. L. J., Q. B. 417.

he has contracted, his claim is confined to the fund, and he cannot enforce payment from individuals; and, if the project miscarries, and funds are not realized, he has no claim upon anybody or for anything.

227. *What words amount to a covenant.*—No precise form of words is necessary to constitute a covenant.¹ Whatever words are used by a party to a deed, if he intends that they shall operate as a covenant he will be held liable. (*d*) The words in a contract under seal, "I will be answerable," or "I will be accountable," to A for £10, or "I am content to give A £10 at Michaelmas," amount to a covenant to pay the money; (*e*) and words used in the future tense, unconnected with precedent words of agreement, will in themselves be sufficient to constitute an express covenant. (*f*) An action of covenant will lie on general words of contract and agreement contained in a deed, although the parties profess not to contract "by way of covenant," as where they "resolved and agreed, and did, by way of declaration and not of covenant, spontaneously and fully agree;" and Lord Eldon said it was nonsense to talk of agreeing and declaring (under seal) without covenanting (*g*) Where a lessee covenanted that he would

(*d*) Per. Ld. Cairns, L. J., *Isaacson v. Harwood*, L. R. 3 Ch. 225; 37 L. J. Ch. 209. (*f*) *Bret v. Cumberland*, Cro. Jac. 399.

(*e*) 3 Leon. 119, pl. 169. *Brice v. Carre*, 1 Lev. 47; 1 Keb. 155. (*g*) *Ellison v. Bignold*, 2 J. & W. 510. *Wood v. Copper Miner's Co.*, 7 C. B. 906. *Sampson v. Easterby*, 9 B.

¹ A vote by a town to pay a bounty to persons enlisting in the federal service, and mustering in to its credit, constitutes a contract on its part with one so enlisting and mustering in. *Roach v. Menomonie*, 24 Wis. 527. And see *Winchester v. Corinna*, 55 Me. 9; *Kittredge v. Waldron*, 40 Vt. 211; *Richardson v. Concord*, Id. 207; *Slone v. Danbury*, 46 N. H. 139; *Newman v. Wright*, 28 Ind. 105; *Brecknock, &c. Dist. v. Frankhouser*, 58 Pa. St. 380.

plough, sow, manure, and cultivate the demised premises, "except the rabbit-warren and sheep-walk," it was held that, as the parties clearly meant by the exception that neither the warren nor the sheep-walk should be ploughed, the exception ought to be construed as a covenant that it should not be done, and that an action of covenant consequently was maintainable for the doing of it. (*h*) So, when it was agreed that a lessee should have "*conveniens lignum non succidendo arbores*," it was held that the lessor might have an action of covenant against him on these words for cutting down the trees. (*i*) Words of recital in a deed will constitute an agreement between the parties upon which an action of covenant may be maintained, where it appears to be the intention of the parties that they should do so. (*k*) Thus, where a termor for ninety-nine years, if three lives should so long continue, recited his interest, and that one life was in being, and assigned his term, it was adjudged that this recital amounted to a covenant that the life continued. (*l*) So the recital in a deed of a previous agreement to do a certain act amounts to a covenant in the deed for the performance of it; for the recital operates as a solemn confirmation of the "agreement and intent precedent." (*m*) But a recital does not necessarily imply a covenant; and whether it does so or not in each case depends on what is to be collected as the intention of the parties

& C. 514. *Courtney v. Taylor*, 7 Sc. N. R. 765. *Williams v. Burrell*, 1 C. B. 429. *James v. Cochrane*, 21 L. J., Ex. 229. *Mason v. Cole*, 4 Exch. 379. *Farrall v. Hilditch*, 5 C. B., N. S. 853; 25 L. J., C. P. 221. *Marryat v. Marryat*, 29 L. J., Ch. 665.

(*h*) *Duke of St. Albans v. Ellis*, 16 East, 352.

(*i*) March 9, pl. 22. Dy. 19, b. pl. (115). *Stevinson's case*, 1 Leon. 324.

(*k*) *Gawdy, J., Severn & Clarke's case*, 1 Leon. 122. *Aspdin v. Austin*, 5 Q. B. 683. *Lay v. Mottram*, 19 C. B., N. S. 479.

(*l*) *Holles v. Carr*, 3 Swanst. 648.

(*m*) *Barfoot v. Freswell*, 3 Kel. 465.

from the whole instrument. (*n*) When there is an acceptance of a trustee-ship under seal, that does not amount to a covenant to perform the duties of the office (*o*)

228. *Words of proviso and condition may be construed as an express covenant*, when such a construction is necessary to give effect to the apparent intention of the parties. Thus, where a conveyance was made by the plaintiff of an incorporeal right to the defendant, provided that out of the first profits the defendant should pay the plaintiff £500, it was held that an action of covenant might be maintained on these words of proviso for the non-payment of the money. (*p*) Where a lease executed by the lessor and lessee contained a covenant on the part of the lessee to maintain and repair a farm-house and premises, "the said farm-house and buildings being previously put into repair" by the lessor, it was held that these words amounted to an absolute covenant on the part of the lessor to put the house into repair, and not merely to a qualification of the covenant of the lessee. (*q*) So, where a lease was granted on condition that the lessee should keep and leave the demised premises at the end of the term in as good plight as he found them, or that he should not exercise thereon a particular trade or business, (*r*) it was held that an action of covenant would lie for a breach of this condition. Where, however, the proviso or condition is by way of qualification of the covenant, or defeasance of the deed or of the estate and interest thereby created, and not in the nature of an agreement, as if a lease be

(*n*) *Ivens v. Elwes*, 24 L. J., Ch. 249.

(*q*) *Connock v. Jones*, 3 Exch. 233;

(*o*) *Holland v. Holland*, L. R., 4 Ch. 449; 38 L. J., Ch. 398.

18 L. J., Ex. 204.

(*r*) *Hodson v. Coppard*, 30 L. J.,

(*p*) *Clapham v. Moyl*, 1 Keb. 842,

Ch. 20; 29 Beav. 4.

granted, provided and on condition that the lessee collect and pay the rents of the other houses of the lessor, an action of covenant is not maintainable. If a lessee for years covenant to repair, "provided always and it is agreed that the lessor shall find great timber, &c.," a covenant is created on the part of the lessor to find the timber by reason of the word "agreed;" but if the lessee had covenanted to repair provided the lessor found the timber, without the word "agreed," the proviso would not have amounted to a covenant on the part of the lessor, but to a qualification only of the covenant of the lessee. (s)

229. *Covenants by implication of law.*—Where a lessee covenanted that he would, at all times during the continuance of his lease, fold his flock of sheep, which he should keep upon the demised premises, upon such parts where the same had been usually folded, it was held that this amounted to a covenant to keep a flock of sheep upon the premises, and that it would consequently be no answer to an action upon the covenant for the defendant to say that he kept no sheep, and therefore had none to fold. (t) And where a landlord demised certain limestone quarries and lime-kilns to a tenant, who covenanted, amongst other things, that he would, at all times and seasons of burning lime, supply the lessor and his tenants with lime at a stipulated price, for the improvement of their lands and the repair of their houses, it was held that this amounted to a covenant to burn lime at such seasons, and that it was no defense to plead that there was no lime burned on the premises, out of which the lessor could be supplied. (u) If two persons covenant

(s) 1 Rolle Abr. 518. Bac. Abr. Cov. Geery v. Reason, Cro. Car. 128. Simpson v. Titterell, Cro. Eliz. 212. Wolveridge v. Steward, 3 M. & Sc. 506.

(t) Webb v. Plummer, 2 B. & Ald. 749.

(u) Earl Shrewsbury v. Gould, Id. 487.

together that it shall be lawful for the one to hold possession of the other's property for a certain time, the law infers, therefrom, an agreement that he shall not detain it for a longer time, but shall then give it up to the owner; if he detains it beyond that time, it is a breach of covenant. (*x*) Where a debt is assigned with the usual power of attorney to sue in the assignor's name, there is an implied covenant by the assignor not to thwart the remedy of the assignee against such debtor. (*y*)

230. Bonds and obligations.—No precise form of words is necessary to create a bond or obligation. Any memorandum in writing, under seal, acknowledging a debt, or denoting the intention of the party to bind himself for the payment of a sum of money, will oblige him as effectually as the most formal words he can make use of—such, for example, as “I, A B, have borrowed £10 of C D,” or “Memorandum that A owes B £10,” or “I have agreed to pay J. S. £19;” for, although the words “*teneri et firmiter obligari*” are generally put into every common bond, yet, when any other words purport the same effect, and the same sense in writing, the law will construe them to have like efficacy. Every word which proves a man to be a debtor, if it be under seal, will charge him with the payment of the money. (*z*) If no time is limited in a bond for the payment of money acknowledged to be due, such money is due immediately, and payable on demand. If it be for the performance of an act on the 29th of February next following, and the next February has only twenty-eight days, it has been said that the party is not bound to do the act until

(*x*) *Randall v. Lynch*, 12 East, 182. case, 1 Leon. 25. Bac. Abr. p. 804.

(*y*) *Gerard v. Lewis*, 36 L. J., C. P. *Sawyer v. Mawgridge*, 11 Mod. 218.
173; L. R., 2 C. P. 305. 1 Rolle Abr. 146. *Watson v. Snaed*

(*z*) *Core's case*, Dyer, 22 b. *Bedow's* Vent. 238.

the next leap-year, when February has twenty-nine days. (a)¹

231. *Dependent and independent covenants.*—“There are,” observes Lord Mansfield, “three kinds of covenants: first, such as are called mutual and independent, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff; secondly, there are covenants which are conditional and dependent, in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenant; there is also a third sort of covenants, which are mutual conditions to be performed at the same time, and, in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act.” (b)

232. *Conditions precedent.*—Representations and stipulations in a contract, as to something future to be done, often constitute conditions precedent to be performed by one party before any liability attaches to the other. Where a tenant covenanted to repair, the

(a) 1 Leon. 101, pl. 132.

Curling, 3 Sc. 754. Thorpe v. Thorpe,

(b) Kingston v. Preston, cited 2 1 Salk. 171. Peters v. Opie, 2 Saund. Doug. 689. Tindal, C. J., Stavres v. 350.

¹ It is a cardinal rule of the interpretation of mutual contracts, that one part is not to be abrogated or repaired by another, when that other has an appropriate meaning, which fully satisfies the words (Hazleton, &c. Co. v. Buck Mountain, &c. Co. 57 Pa. St. 301). Words are the most usual evidence of intent, and punctuation, while it may aid in ascertaining that

landlord "finding, allowing, and assigning timber sufficient for such reparations to be cut and carried by the lessee," it was held that the finding and assigning the timber, by the lessor, was a condition precedent to the liability of the lessee to repair; (c) but if the landlord is ready and willing, and offers to find and allow the timber, there is a sufficient performance of the condition on his part. (d) And if the covenant has annexed to it a mere license to take timber for the purpose of reparation, the license does not amount to a qualification of the covenant, so as to exonerate the tenant from his liability to repair in case there should happen to be no timber on the demised premises fit for reparation. (e) Whenever it appears to have been the intepⁿtion of the parties that performance of one stipulation should not be a condition precedent to the performance of another, effect will be given to such intention; (f) but where the intention is to rely on a previous performance, and not on the remedy for

(c) *Thomas v. Cadwallar, Willes, Jones*, 28 L. J., Q. B. 201; 1 EL. & EL. 496. And see *Neale v. Ratcliffe*, 15 484.

Q. B. 916.

(f) *Christie v. Borelly*, 7 C. B., N.

(d) *Martyn v. Clue*, 18 Q. B. 681. S. 561; 29 L. J., C. P. 153. *Dodd v.*

(e) *Dean & Chapter of Bristol v. Ponsford*, 6 C. B., N. S. 324.

meaning, is not vital to the expression of the contract (*White v. Smith*, 33 Pa. St. 86). And see *Evans v. Sanders*, 8 Port. (Ala.) 479; *Riley v. Vanhouten*, 5 Miss. (4 How.) 428; *Peckham v. Huddock*, 36 Ill. 38; *Hawes v. Smith*, 12 Me. (3 Fairf.) 429; *Mansfield R. R. Co. v. Vieder*, 17 Ohio, 385; *Godeffroy v. Caldwell*, 2 Cal. 489; *Fowler v. Smith*, Id. 568; *Brady v. Reynolds*, 13 Id. 31; *McCavoy v. Long*, 13 Ill. 147; *Falley v. Giles*, 29 Ind. 114; *Madna v. Jones*, 1 Morr. (Iowa) 204; *Rindskoff v. Barrett*, 14 Iowa, 101; *Barrett v. Dean*, 21 Id. 423; *Hunter v. Miller*, 6 B. Mon. 612; *Winslow v. Herrick*, 9 Mich. 380; *Rogers v. Broadnax*, 27 Tex. 238; *Robinson v. Stow*, 39 Ill. 568; *Thomas v. Wiggers*, 41 Id. 470; *Karmuller v. Krotz*, 18 Iowa, 352; *Pater v. Breckenridge*, Hard. (Ky.) 21; *Price v. Evans*, 26 Mo. 30; *Scott v. Glaze*, 29 Iowa, 168; *Smith v. Nelson*, 33 Id. 24; *Lamb v. Klaus*, 30 Wis. 94.

non-performance, performance is a condition precedent. (*g*) Where a landlord granted all the coal lying and being within and under certain premises, and the grantee covenanted to pay so much for every acre of coal found within or under the said premises, and to pay £40 a year whether the whole of an acre should be gotten or not, it was held that the finding of coal was not a condition precedent to the landlord's right to receive the £40 a year. (*h*)

233. *Waiver of conditions precedent.*—Where a stipulation in the nature of a condition precedent has been partially performed, it ceases to be available as a condition, and becomes a stipulation by way of agreement, for the breach of which compensation must be sought in damages. (*i*)¹

234. *Independent covenants and promises.*—"If there be a day set for the payment of the money, or for the doing of the thing which one promises and agrees to do for another thing, and that day is to happen, or may happen, before the other thing can be performed, an action may be brought for the money before the thing be done; for it appears that the party relied upon his remedy upon the contract," and not upon a previous or concurrent performance. (*k*) If in a contract of hiring and service it is stipulated that the hire shall be paid before the time appointed for the rendering of the service, there the servant may bring an

(*g*) *Roberts v. Brett*, 18 C. B. 573 ;

6 C. B., N. S. 611 ; 28 L. J., C. P. 32 ;

34 Id. 241 ; 11 H. L. Cas. 337.

(*h*) *Jowett v. Spencer*, 1 Exch. 649.

(*i*) *Behn v. Burness*, 3 B. & S. 753 ;

32 L. J., Q. B. 204. *Pust v. Dowie*,

32 L. J., Q. B. 179 ; 5 B. & S. 20, 33.

(*k*) *Holt, C. J., Thorp v. Thorp*, 12

Mod. 461. *Parker v. Rawlings*, 12

Moore, 529 ; 4 Bing. 280. *Judson v.*

Bowden, 1 Exch. 166 ; 17 L. J., Ex.

172. *Terry v. Duntze*, 2 H. Bl. 389.

Cutter v. Bower, 11 Q. B. 973. *Dicker*

v. Jackson, 6 C. B. 114.

¹ And one party to a contract, by waiving the benefit of a condition therein, excuses the other party from showing a compliance therewith. *Attix v. Pelan*, 5 Iowa, 336.

action for the money before the service has been performed. (1) So, if there are mutual covenants for the sale and purchase of an estate, and a fixed day is appointed for the payment of the purchase-money, and another and later day for the conveyance of the property, the money must be paid on the day appointed, although the purchaser has not got the estate. (m) Where a purchaser agreed to pay for goods, not on, but after, delivery, it was held that actual delivery was precedent to the right of the vendor to sue for the price, unless the defendant had refused to receive the goods, and by his own act had prevented the performance of the contract by the plaintiff. (n) So, where a vendor agreed to deliver forthwith fifty tons of iron for the price of £9 per ton, the price to be paid in cash in fourteen days, it was held that the delivery of the iron was a condition precedent to the payment of the price, and, the vendor not having delivered the goods within the fourteen days, that the defendant was discharged from liability. (o) If a deed purports and professes to grant and convey an interest, the covenants of the grantee immediately relating to that interest, and founded on the grant thereof, are conditional and qualified, so that the liability of the grantee upon them is dependent upon the interest, or some portion thereof, being actually transmitted to him. But this is not the case with respect to the covenants of the grantor of that interest; his covenants are independent and unconditional; and he is consequently liable upon them, whether the interest he professes to convey does or does not pass. (p)

(1) Pool's case, 1 Wms. Saund. 320 b.

(m) Sibthorp v. Brunell, 3 Exch. 826. Yates v. Gardiner, 20 L. J., Ex.

327. Pordage v. Cole, 1 Wms. Saund. 319, h. Mattock v. Kinglake, 10 Ad.

& E. 50. Spiller v. Westlake, 2 B. & Ad.

157. Walker v. Harris, 1 Anstr. 245.

(n) Ripley v. M'Clure, 4 Exch. 357.

(o) Staunton v. Wood, 16 Q. B. 638.

(p) Walter v. Dean, &c., of Nor-

235. *Covenants founded on a mutuality of obligation and liability* must be mutually binding upon the parties to them. If, therefore, one of several parties to a deed inter partes founded on mutual covenants neglects to execute the deed, the contract is not binding on the others who have executed it. (q) And, if a deed of covenant inter partes, originally binding upon all, becomes ineffectual and inoperative as to one by matter ex post facto, such as bankruptcy, the deed is wholly void. (r) Where there are mutual and dependent covenants on the part of directors of companies and subscribers to the capital thereof, and the directors do not execute the deed, the subscribers will not be responsible upon their covenants. (s) But, where the covenant is not founded upon some interest to be created by deed, or upon a mutuality of obligation and liability, the general rule of law is that, where a party has a covenant made to him, and he in return is to make a covenant, he may sue on the covenant made to him, even though he himself has not executed the deed. Thus, where a mortgage deed, containing cross covenants between mortgagee and mortgagor was executed by the mortgagee alone, it was held that the latter was, nevertheless, liable upon his covenants. (t)

236. *Implied stipulations.*—If a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he will do nothing of his own motion to put an end to

wich, 1 Brownl. & Goldes. 21; Owen, 136. Jones v. King, 4 M. & S. 188. Northcott v. Underhill, 1 Raym. 388.

(q) Antram v. Chace, 15 East, 212. Marsh v. Wood, 9 B. & C. 665.

(r) Kearsley v. Carstairs, 2 B. & Ad. 726.

(s) In re Dover, Hastings, &c., 18 Jur. 52.

(t) Morgan v. Pike, 14 C. B. 473.

that state of circumstances under which alone the arrangement can be operative. (u)¹

237. Computation of time.—Whenever a person is allowed a specified number of months for the delivery of an abstract of title, the payment of a sum of money, or the performance of any particular act or duty, the month is understood to be a calendar and not a lunar month, unless it appears, from the general context of the contract, that a lunar month was intended. (v) When time is to be computed from a particular day, or from the day of an act being done, or the happening of a particular event, such day is to be excluded from the computation; for our law rejects fractions of a day, and an act done in the compass of it is not referable to one portion of the day more than another, so that the act is not considered to be passed and done with until the day has passed. When, therefore, goods were sold on the 5th of October to be paid for in two months, it was held that the day on which the contract was made, was to be excluded from the computation, and that an action for the price could not be maintained until after the expiration of the 5th of December. (x)²

(u) *Stirling v. Maitland*, 5 B. & S. 810; 34 L. J., Q. B. 1. *Mc Intyre v. Gray*, 6 Moore, 486; 3 B. & B. 186.

Belcher, 14 C. B., N. S. 654; 32 L. J., C. P. 254. (x) *Webb v. Fairmaner*, 3 M. & W. 473. *Young v. Higgon*, 6 Id. 49.

(v) *Lang v. Gale*, 1 M. & S. 111. *Mercantile Marine Insurance Co. v. Jolly v. Young*, 1 Esp. 186. *Corkell Titherington*, 34 L. J., Q. B. 11.

¹ But where an obligation is contracted on condition that an event shall happen within a limited time, the condition must be considered to have been waived when the event has not occurred within the time. *Yeatman v. Broadwell*, 1 La. Ann. 424.

² See *Barrett v. Ellor*, 6 Jones (N. C.) L. 550; *Hammond v. Gilmore*, 14 Conn. 479; *Brown v. Gammon*, 14 Me. 276; *Smith v. Lewis*, 26 Conn. 110; *Putnam v. Mellen*, 34 N. H. 71; *Sunmer v. Parker*, 36 Id. 449; *West v. Murph*, 3 Hill, 284.

In considering whether, upon a contract to do an act or enter into an engagement at or for a definite time from a certain date, the time is to be reckoned exclusively or inclusively of the last day, it is impossible to lay down any fixed rule; each case must depend on its own circumstances and subject-matter (*y*) But in general the last day is to be included. Thus, where a lease was granted for twenty-one years from the 25th of March in a particular year, the lease was held to continue until the end of the 25th of March of the last year. (*z*) So, where a bankrupt was to be protected from the 16th until the 29th of July, it was held that the whole of the 29th was included. (*a*) So, where goods were sold to be paid for in two months' time, it was held that the first day, the day of the sale, was excluded, and the last day included. (*b*) And, where a patent contained a proviso that the specification was to be filed within one month's time next after the date thereof, the day on which the letters patent were granted was held to be excluded. (*c*) Again, where a security not to do a particular thing, was to be given within six months from a testator's death, the last day of the six months was held to be included. (*d*) And where, by a policy of insurance, goods were insured against fire from the 14th of February until the 14th of August, it was held that the

(*y*) *Pugh v. Duke of Leeds*, 2 Cowp. 714.

(*z*) *Ackland v. Lutley*, 9 Ad. & E. 879.

(*a*) *Belhouse v. Mellor*, 4 H. & N. 116; 28 L. J., Ex. 141.

(*b*) *Webb v. Fairman*, 3 M. & W. 473.

(*c*) *Watson v. Pears*, 2 Camp. 294.

(*d*) *Lester v. Garland*, 15 Ves. 248.

Appleton v. Chase, 19 Me. 74; *Howe v. Huntington*, 15 Id. 350; *Sewall v. Wilkins*, 14 Id. 168; *Clocker v. Franklin Mfg. Co.* 3 Sumn. 530; *Sawyer v. Hammatt*, 15 Me. 40; *Knight v. New England, &c. Co.* 2 Cush. 286.

whole of the latter day was within the protection of the policy. (e)¹

238. *Of the interpretation of contracts made in one country and enforced in another.*—All contracts made in one country concerning land and houses and immovable property situate in another country must be interpreted according to the law of the country in which the property is situate, the “*lex loci rei sitæ*,” and not by the “*lex loci contractus*,” or the law of the country where the contract is made. (f)² A contract or settlement, therefore, made in consideration of marriage, which deals with heritable property situate in Scotland, will be construed in England according to the law of Scotland. (g) But contracts in general receive their interpretation either from the law of the country in which the contract is made, the “*lex loci contractus*,” or the law of the country in which the contract is to be performed. (h) The *lex loci contractus* generally prevails in all that relates to the legal validity of the contract, the “*vinculum obligationis*,” and the law and custom of the place of performance in all that relates to the fulfillment of the contract. (i) If no place of performance is specified on the face of the contract, the *lex loci contractus* will determine the rights that are acquired on the one side, and the liabilities incurred on the other. If the contract is valid by the law of the country where it is made, it is valid

(e) *Isaacs v. The Royal Insurance Co.*, L. R., 5 Ex. 296; 39 L. J., Ex. 189.

(f) *Story's Conf. of Laws*, §§ 424, 428.

(g) *Duncan v. Cannan*, 23 L. J., Ch. 265.

(h) *Robinson v. Bland*, 1 W. Bl. 256, 259. *Gibbs v. Fremont*, 9 Exch. 25.

(i) *Scott v. Pilkington*, 2 B. & S. 11; 31 L. J., Q. B. 81.

¹ See note 1, p. 354; *Myers v. De Mier*, 52 N. Y. 647; *Howe v. Huntington*, 14 Me. 350.

² See *post*, note 1, p. 362.

everywhere, unless it is *contra bonos mores*, or is a contract for the doing of a thing which is directly prohibited and forbidden in, or contrary to the public policy of, the country where the contract is sought to be enforced; for, when we come to remedies, they must be pursued by the means which the law points out in the place where the remedy is sought to be obtained. (*k*) "So much of the law of the country where the contract is made," observes Tindal, C. J., "as affects the rights and merits of the contract, all that relates '*ad litis decisionem*,' is adopted from the foreign country; so much of the law as affects the remedy only, all that relates '*ad litis ordinationem*,' is taken from the *lex fori* of that country where the action is brought." (*l*)¹

The rule governing the interpretation of a contract made in one country, to be performed wholly or partly in another, is, that the law of the country where the contract is made governs as to the nature of the obligation and the interpretation of it, if the parties to the contract are either subjects of the power there ruling, or as temporary residents owe that power a temporary allegiance. (*m*) But a contract between an Englishman domiciled and resident in England, and an Englishman resident in a foreign country, but not having acquired a foreign domicile, must be governed by the rules of English law. (*n*) And,

(*k*) *Robinson v. Bland*, 2 Burr. 1085; 1 W. Bl. 234, 257. *Forbes v. Cochrane*, 2 B. & C. 471. *Guepratte v. Young*, 4 De G. & Sm. 217. *Cood v. Cood*, 33 L. J., Ch. 278. *Hope v. Hope*, 8 De G., M. & G. 731; 26 L. J., Ch. 417.

(*l*) *Huber v. Steiner*, 2 Sc. 304. *Leroux v. Brown*, 12 C. B. 803; 22 L.

J., C. P. 1. *De La Vega v. Vianna*, 1 B. & Ad. 284. *Macfarlane v. Norris*, 2 B. & S. 783; 31 L. J., Q. B. 245. *Williams v. Wheeler*, 8 C. B., N. S. 299.

(*m*) *Peninsular & Oriental Steam Navigation Co. v. Shand*, 3 Moo. P. C., N. S. 272.

(*n*) *Cood v. Cood*, 33 Beav. 314.

¹ See *post*, note 1, p. 362.

when the government of a state contracts a loan in another country, the contract is governed by the law of the borrowing state, and not by that of the country where the contract is made. (o) When a contract is made in a foreign country and in a foreign language, an English court, having to construe it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if any); thirdly, evidence of the foreign law applicable to it; and, fourthly, evidence of any peculiar rules of construction which may exist in that law; and must then itself interpret the document on ordinary principles of construction. (p) Where mutual debts are contracted in a foreign country, the law of that country as to set-off will apply. (q)

239. *Foreign bonds, bills, and notes.*—If a bond or obligation for the payment of a sum of money be made in France, and no place of payment is designated on the face of the contract, the extent of obligation and liability acquired on the one side, and the rights acquired on the other, will be regulated by the law of France; (r) but, if the money is to be paid in England, the legal effect of the contract will be determined by the English law, the “*lex loci solutionis*.” The interpretation and legal obligation of a bill of exchange or a promissory note are regulated by the law of the country where the amount of the bill or note becomes payable by force of the contract, so that on a foreign bill the liability of the acceptor, and the rate of interest payable, where no rate is expressed on the face of the bill, will be determined by the law of the

(o) *Smith v. Weguelin*, L. R., 8 Eq. 198; 38 L. J., Ch. 465.

(p) *Di Sora v. Phillips*, 10 H. L. Cas. 624.

(q) *Macfarlane v. Norris*, 2 B. &

S. 783; 31 L. J., Q. B. 245. *Sed quære.*

(r) *Melan v. Duke de Fitzjames*, 1 B. & P. 142.

country where the bill is payable; but the obligation of the drawer, who binds himself to pay in case the acceptor does not, will be governed by the law of the place where the bill was drawn, and not by the law of the place where it was to be paid by the drawee. In the case of a bill drawn in France and accepted in England, if the drawer is sued upon the bill, the contract will be governed by the law of France, where the bill was drawn; if the acceptor is sued, it will be governed by the law of England, where the acceptor's contract to pay was made. (s) A bill drawn in France prima facie bears interest as a debt in France would do, if nothing else appear; but, if that bill be endorsed in Belgium, the indorser is a new drawer; and it may be a question whether this indorsement is a drawing of a new bill in Belgium, or only a new drawing of the French bill. In the former case it would carry the Belgian, in the latter the French rate of interest. (t) The indorsement of a bill in blank does not, according to the French law, pass the property in the bill absolutely, but only subject to all the exceptions which would be available against the indorser himself; but such an indorsee is entitled to sue on the bill in his own name in France, and therefore can do the same in this country. (u) If the bill is both drawn and accepted in England, an indorsement in blank in France is valid for all purposes in this country. (x)¹

240. *Foreign purchases.—Affreightments.*—The

(s) *Cammell v. Sewell*, 29 L. J., Ex. C. P. 473, 39 L. J. C. P. 254; overruling *Trimbey v. Vignier*, 1 Bing. N. 350; 5 H. & N. 728.

(t) *Allen v. Kemble*, 6 Moore, P. C. C. 151.
322. *Gibbs v. Fremont*, 9 Exch. 31; (x) *Lebel v. Tucker*, L. R., 3 Q. B. 22 L. J., Ex. 302. 77; 37 L. J., Q. B. 46.

(u) *Bradlaugh v. De Rin*, L. R., 5

¹ See note 1, p. 362.

fulfillment of a contract for the sale of goods, so far as it relates to the transfer and delivery of the goods to the purchaser, according to quantity, weight, or measure, will be regulated by the law of the country where the delivery is to be made. (y) If a contract is made in England to load a full cargo on board a vessel at a foreign port, the meaning of the words "full cargo" will be regulated by the law of the foreign port and not by the law of England. If an order is sent from England for the purchase of goods in Russia, to be delivered on board an English ship in a Russian port, the rights and liabilities growing out of the contract will be governed by the law of Russia; and, if, after the delivery of the goods on board ship, the unpaid vendor has a right, by the law of Russia, to re-possess himself of the goods, on having reason to suspect that the purchaser contemplates bankruptcy, or intends to make the vendor lose the purchase-money, this right will be recognised in our courts of common law. (z)

The validity of a bottomry-bond taken up in a foreign port upon a foreign ship, freight, and cargo, the owners of the cargo being English, and the ship and cargo being proceeded against in England, is to be governed by the general maritime law, and not by the *lex loci contractus*, or the law of the country the vessel belongs to. (a)

241. *What determines the locus contractus.*—When contracts are entered into between parties residing in different countries through the medium of letters, the place where the final assent has been given

(y) 3 Burge Colon. Law, p. 771.

Rosseter v. Cahlmann, 8 Exch. 351.

Byles, J., Meyer v. Dresser, 33 L. J.,

C. P. 289. Lloyd v. Guibert, L. R., 1

Q. B. 115; 35 L. J., Q. B. 74.

(z) Inglis v. Usherwood, 1 East,

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(a) Duranty v. Hart, 2 Moo. P. C.,

N. S. 289.

by one party to an offer made by another is the place where the contract is considered to have been made. Thus, if a merchant at Genoa, by letter or by agent, offers to sell certain goods to a person in London at a certain price, and the latter accepts the offer, the contract is made in London. But, if the person in London refuses the offer, and proposes to buy upon different terms, and the merchant of Genoa agrees to the proposal there, the contract will then be deemed to have been concluded at Genoa. (*b*) "If I send my agent to Scotland, and he in my name makes a contract there, it is the same as if I were myself on the spot; and the contract must be considered as a contract entered into in Scotland." (*c*)¹ In the case of contracts in writing, the place where the covenantor or promisor executes or signs the contract is the place where it is made, although the contract is inchoate and incomplete, and does not obtain legal validity until something else has been done with his authority at some different place. (*d*)

(*b*) 2 Burge on Colon. Law, 753.

(*d*) *Snaith v. Mingay*, 1 M. & S.

(*c*) *Albion Fire, &c. v. Mills*, 3 Wils. 92.

& Shaw, 233.

¹ In the United States, a contract made in one state, to be fulfilled there, subject to ratification in another state, is, when ratified, to be interpreted by the laws of the first state (*Golson v. Ebert*, 52 Mo. 260). And see, among the different states, *Hildreth v. Shephard*, 65 Barb. 265; *Gray v. Jackson*, 51 N. H. 9; *Klinck v. Price*, 4 W. Va. 4; *Ivey v. Laland*, 42 Miss. 444; *Abberger v. Marrin*, 102 Mass. 70; *Ely v. Webster*, Id. 304; *Brockway v. Maloney*, Id. 308; *Downer v. Cheesebrough*, 36 Conn. 39; *Waldron v. Ritchings*, 9 Abb. (N. Y.) Pr. N. S. 359; *Sands v. Smith*, 1 Neb. 108; *Ford v. Buckeye Ins. Co.* 6 Bush. (Ky.) 133; *Campbell v. Nichols*, 33 N. J. L. (4 Vroom) 81; *Mumford v. Canty*, 50 Ill. 370; *Partee v. Silliman*, 44 Miss. 272; *Hyatt v. Bank of Kentucky*, 8 Bush. (Ky.) 193; *Drew v. Smith*, 59 Me. 393; *Laird v. Hedges*, 26 Ark. 359. The general rule is, that the operation of a contract and the rights of the parties are to be determined, so far as they depend on the

When a contract, entered into in one country, is sought to be enforced in another country, it must not only be valid according to the law of the country where it was made, but also according to the law of the country in which it is sought to be enforced. (e)¹

(e) *Hope v. Hope*, 8 D. M. & G. Rail. Co., 12 C. B., N. S. 72; 31 L. 731; 26 L. J., Ch. 417. *Grell v. Levy*, J., C. P. 286.
16 C. B., N. S. 79. *Branley v. S. E.*

construction and validity of an agreement, by the law of the place where the contract is made (*Werder v. Arall*, 2 Wash. (Va.) 282; *Maguire v. Pengree*, 30 Me. 508; *Boughton v. Bradley*, 36 Ala. 689; *Butler v. Myer*, 17 Ind. 77; *Kanaga v. Taylor*, 7 Ohio St. 134). It devolves upon the party interested to claim the benefit of the foreign laws to show what is the law of the place where the contract was made, or was to be performed. In the absence of such affirmative showing, the courts of the state where the suit is brought will apply the law of such state to the contract (*Bean v. Briggs*, 4 Iowa, 464; *Whidden v. Seelye*, 40 Me. 247; *Dakin v. Pomeroy*, 9 Gill. (Md.) 1; *Fonke v. Fleming*, 13 Md. 392; *Alien v. Watson*, 2 Hill (S. C.) 319; *Crosby v. Huston*, 1 Tex. 203). And see, generally, *Bernard v. Barry*, 1 Iowa, 388; *Humphreys v. Powell*, 1 Ill. (Breese) 231; *Mason v. Dousay*, 35 Ill. 424; *Hunt v. Standart*, 15 Ind. 33; *Pratt v. Wallbridge*, 16 Id. 147; *Stacy v. Baker*, 2 Ill. (1 Scam.) 417; *Mendenhall v. Galely*, 18 Ind. 149; *Fisher v. Otis*, 3 Chandler (Wis.) 83; *Brown v. Nevitt*, 27 Miss. 801; *Bliss v. Braynard*, 41 N. H. (8 Fost.) 369; *Lewis v. Headley*, 36 Ill. 433; *McAllister v. Smith*, 17 Id. 328; *Titus v. Scantling*, 4 Blackf. (Ind.) 89; *Boyd v. Ellis*, 11 Iowa, 97). Contracts made in China, by American merchants, are, by our treaties and statutes, and the English treaties, governed by the common law. *Forbes v. Scannel*, 13 Cal. 242.

¹ *Smith v. Godfrey*, 8 Fost. 379; *Blanchard v. Russel*, 13 Mass. 4; *Bank of Augusta v. Earle*, 13 Pet. 584. If the contract relates to movables, which have no place, no sequelam, in the language of the civil law, "*mobilia inhærent ossibus domini*," they are to be construed according to the law of the place where they are made, or the *lex loci contractus*; if to immovables, it is to be construed according to the law of the place where the property is situated, or the *lex loci rei sitæ*. 2 *Parsons on Contracts*, 571; *Story's Conflict of Laws*, § 383; *Warrender v. Warrender*, 9 Bligh, 127; *United States v. Crosby*, 7 Cranch, 115; *Cutter v. Davenport*, 1 Pick. 81; *Hosford v.*

Nichols, 1 Paige 220; Wills v. Cowper, 2 Hamm. 312; Kerr v. Moon, 9 Wheat. 565; McCormick v. Sullivant, 10 Id. 192; Darby v. Mayer, Id. 465; Golson v. Ebert, 52 Mo. 260; Hildreth v. Shepherd, 65 Barb. 265; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Gray v. Jackson, 51 N. H. 9; As to the rules applied to questions of interest and usury, see Story's Conflict of Laws, § 298; 2 Parson on Contracts, 582 et seq.; Depau v. Humphreys, 2 Mart. 1 La. 1; Andrews v. Pond, 13 Pet. 65; Peck v. Mayo, 14 Vt. 33; Chapman v. Robertson, 6 Paige, 627; Quince v. Callandar, 1 Sessions, 160; Scofield v. Day, 20 Johns. 102; Boyce v. Edwards, 2 Pet. 111; Fanning v. Consequa, 17 Johns. 511; Vinthrop v. Carleton, 12 Mass. 4; Foden v. Sharp, 4 Johns. 183; Whiston v. Stodder, 8 Mart. (La.) 35; Blanchard v. Russell, 13 Mass. 1; Blake v. Williams, 6 Pick. 286; Braynard v. Marshall, 8 Pick. 194. A discharge of a contract under the law of a country which is not that where the contract was made or to be performed, will not discharge the contract in the country where it was made or to be performed. 2 Parsons on Contracts, 587. Very v. McHenry, 22 Me. 296.

SECTION II.

OF THE ADMISSIBILITY OF ORAL EVIDENCE IN WRITTEN
CONTRACTS.

242. *Inadmissibility of oral evidence to add to, alter, or contradict, a written contract.*—Most systems of jurisprudence have manifested a decided preference for written memorials over verbal representations founded on the doubtful or imperfect recollection of witnesses. The French law requires a very large class of contracts to be put into writing, “in consequence,” it observes, “of the corruption of manners and subornation of witnesses,” and formally prohibits the admission of oral evidence against the contents of a written document. (*f*) It is a fundamental rule of our own common law, that oral¹ evidence shall not be given to add to, subtract from, or alter or vary, any description of written contract: “quoties in verbis nulla est ambiguitas, nulla expositio contra verba fienda est.” This general rule or principle of law has been established on the ground that writing stands higher, in the scale of evidence, than oral testimony, and that the stronger evidence ought not to be controlled or altered by the weaker. (*g*)² It has been held that oral evidence is inadmissible to show that a grant of an annuity, not

(*f*) POTH. OBL. No. 785.(*g*) *Davis v. Symonds*, 1 Cox, 404.¹ See a distinction between “oral” and “parol” evidence in Morgan’s Best on Evidence, vol. i., § 223, note (*y*).² *Huse v. McQuade*, 52 Mo. 388; *Clark v. N. Y. Life Ins. Co.* 7 Lans. (N. Y.) 323; *Kerr v. Kuykendall*, 44 Miss. 137; *Howlett v. Howlett*, 56 Barb. 467; *Campbell v. Johnson*, 44 Mo. 247; *Delano v. Goodwin*, 48 N. H. 203; *Perkins v. Young*, 82 Mass. (16 Gray) 389; *Cocke v. Bailey*, 42 Miss. 81; *Kirk v. Hartman*, 63 Pa. St. 97.

made subject to redemption on the face of the deed, was nevertheless intended by the parties to be redeemable; (*h*) also, that the verbal declaration of an auctioneer, made at the time of sale, cannot be given in evidence in opposition to the printed conditions of sale, unless the declaration has been fraudulently made. (*i*) If, in a contract of charter-party, a person states himself to be the owner of a vessel, and then proceeds to let or charter the vessel for a certain term, he cannot contradict, by oral testimony, his own averment in writing, and show that he acted only as the agent of the owner. (*k*) If a written contract of purchase and sale describes the nature and character of the things sold, oral evidence is inadmissible to add to or alter the written description; (*l*) if it fixes the time for the completion of the purchase, or the time for the delivery of the goods, a contemporary agreement to substitute another day must be expressed in writing; (*m*) and if the time for payment is named, oral evidence is inadmissible to show that the payment was to be prolonged, or that it was to depend on a contingency, or be made out of a particular fund. So, on a written contract for a weekly hiring, oral evidence is inadmissible to show that a yearly hiring was intended. (*n*) And on a contract to manufacture and deliver goods at a specified time, for a specified price, oral evidence is inadmissible to show that a portion of the price agreed to be paid for the goods was in consideration of the undertaking to deliver them at

- (*h*) *Haynes v. Hare*, 1 H. Bl. 662. 325. *Harnor v. Groves*, 24 Id. C. P. 53.
 (*i*) *Gunnis v. Erhart*, 1 H. Bl. 289. 53.
Shelton v. Livius, 2 Cr. & J. 411. (*m*) *Stead v. Dawber*, 10 Ad. & E. 57; 2 P. & D. 451. *Marshall v. Lynn*, 6 M. & W. 109. *Stowell v. Robinson*, 3 Bing. N. C. 928.
Higginson v. Clowes, 15 Ves. 522. (*n*) *Evans v. Roe*, L. R., 7 C. P. B. 350.
 (*k*) *Humble v. Hunter*, 17 L. J., Q. B. 350. 138.
 (*l*) *Smith v. Jeffries*, 15 L. J., Ex. 138.

the times specified, and that the market price was much less than that agreed to be paid. (o) Oral evidence is inadmissible to make a promissory note, absolute upon the face of it, conditional or payable upon a contingency, (p) or to make a contract which, by the terms of it, is to commence in *præsenti*, to commence in *futuro*; (q) or to show that it was agreed, when a bill or note was given or indorsed, that the instrument should be renewed, and that payment should not be demanded at the time when it became due; (r) but where bought and sold notes differed, oral evidence was admitted to prove an arrangement between the broker and the purchaser, by which the apparent variance was explained and shown to be immaterial. (s)

A warranty, made orally on the completion of a written contract of sale, cannot be introduced as part of the contract, if the contract itself is silent as to the fact of such warranty; (t) but a loose and incomplete memorandum of sale will not exclude oral evidence of a warranty. (u) If a written demise be silent as to the payment of the ground rent, (x) or land tax, (y) oral evidence is inadmissible to show that the tenant agreed to pay it. If a written contract of purchase and sale imports that the delivery of the goods and the payment of the price are to be concurrent acts,

(o) *Brady v. Oastler*, 3 H. & C. 112; 33 L. J., Ex. 300.

(p) *Rawson v. Walker*, 1 Stark. 361. *Moseley v. Hanford*, 10 B. & C. 729. *Foster v. Jolly*, 1 C. M. & R. 703. *Free v. Hawkins*, 1 Moore, 535; 8 Taunt. 92. *Adams v. Wordley*, 1 M. & W. 374. *Abrey v. Crux*, L. R., 5 C. P. 37; 39 L. J., C. P. 9.

(q) *Williams v. Jones*, 5 B. & C. 108.

(r) *Hoare v. Graham*, 3 Campb. 56.

Brown v. Langley, 5 Sc. N. R. 249. *Young v. Auston*, L. R., 4 C. P., 553; 38 L. J., C. P. 233.

(s) *Kempson v. Boyle*, 3 H. & C. 763; 34 L. J., Ex. 191.

(t) *Powell v. Edmonds*, 12 East, 6. *Harnor v. Groves*, 15 C. B. 667.

(u) *Allen v. Pink*, 4 M. & W. 140.

(x) *Preston v. Merceau*, 2 W. Bl. 1249.

(y) *Rich v. Jackson*, 4 Br. C. C.

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oral evidence is inadmissible to show that credit was bargained for and intended to have been given (*z*) But a writing containing only part of the contract and not being evidence of a concluded agreement does not shut out oral evidence of the time of payment.¹ Where the defendant, by letter, ordered the plaintiff to send goods to a wharf, oral evidence was admitted to show that the order was given on the faith of a promise made by word of mouth by the plaintiff to the defendant, that the defendant should have six months' credit for the payment of the goods. (*a*) When an agreement for a lease has been drawn up in writing, oral evidence cannot be given to show that more premises were intended to be included in the agreement than those actually mentioned in it; or that a greater rent was to be paid than that actually expressed; or that the rent was to be paid quarterly, when, by the agreement, it is to be paid yearly; or that the rent was to commence at a later day than that named in the agreement; for, whenever the contract is reduced into writing, nothing that is not found impressed upon it can be considered as forming part of the contract. (*b*) But the contract may be evi-

(*a*) *Ford v. Yates*, 2 Sc. N. R. 645.

(*b*) *Meres v. Ansell*, 3 Wils. 275.

(*g*) *Lockett v. Nicklin*, 19 L. J., Ex. 403; 2 Ex. 93. *Stones v. Dowler*, 29 L. J., Ex. 122. *Morgan v. Griffith, L.* R., 6 Ex. 70; 40 L. J., Ex. 46. *Henson v. Coope*, 3 Sc. N. R. 48. *Kain v. Old*, 4 D. & R. 61. *Dickson v. Zizinia*, 20 L. J., C. P. 73.

¹ And so exceptions to the rule occur to show circumstances or conditions of signing (*Robertson v. Evans*, 3 S. C. 330). Or to explain an erasure (*Johnson v. Pollock*, 58 Ill. 181). Or as to technical terms, or to show that it is an illegal contract (*Martin v. Clark*, 8 R. I. 389), and the like. And by various other circumstances arising in particular cases. See *Weaver v. Fletcher*, 27 Ark. 510; *Basshor v. Forbes*, 36 Md. 154; *Arbiter v. Day*, 39 Conn. 155; *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180; *Dixon v. Cook*, 47 Miss. 220. And see cases cited in note 1, p. 371.

denced and established, as we have previously seen through the medium of several writings, as well as by one document; and the import of a written paper, purporting to contain the terms of a contract, may be controlled, altered, or extended, by a contemporaneous agreement in writing, (*c*) provided it be shown that both papers refer to the same subject-matter, persons, and things. And where there is a proposal only in writing, oral evidence may be given to show that that proposal has been accepted, (*d*) but not of what passed at the time of making the proposal for the purpose of varying the contract. (*e*)

But although, by the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to, subtract from, or in any manner to vary or qualify the express terms of the written contract, (*f*) yet an agreement upon a distinct matter may be shown to have been made by word of mouth, and may be enforced; (*g*) and after an agreement has been reduced into writing, it is competent to the parties, at any subsequent time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, subtract from, or vary or qualify, the terms of it, and thus to make a new contract, which may be

(*c*) *Brown v. Langley*, 5 Sc. N. R. 249.

(*d*) *Wake v. Harrop*, 6 H. & N. 768; 30 L. J., Ex. 273.

(*e*) *Hotson v. Browne*, 9 C. B. N. S. 442; 30 L. J., C. P. 106.

(*f*) *Ld. Hardwicke, Partridge v.*

Powlet, 2 Atk. 383. *Wollam v. Hearn*, 7 Ves. 218.

(*g*) *Lindley v. Lacey*, 34 L. J., C. P. 7; 17 C. B., N. S. 578. *Morgan v. Griffith*, L. R., 6 Ex. 70; 40 L. J., Ex. 46. *Ante*, p. 366-367.

proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon it, provided the new contract, thus sought to be established in the place and stead of the original written contract, be not a contract of such a nature as is required to be authenticated by writing; for, when that is the case, the new substituted contract cannot be proved partly by writing and partly by oral testimony, (*h*) and will not be good for any purpose; but the original contract will remain in force. (*i*) Parol evidence is, however, admissible where it goes to show, not a new contract, but simply a voluntary forbearance by the plaintiff at the request of the defendant; for in such a case the statute of frauds does not apply. (*k*)¹

243. *When contracts may be proved partly by writing and partly by oral testimony.*—Oral testimony, in aid of insufficient written evidence of a contract, is admissible when the contract is not required, by law, to be in writing. If a written document, for example, amounts to a mere admission or acknowledgment of certain facts, forming a link only in the chain of evidence by which a contract is sought to be established, it may be given in evidence concurrently with, and may be aided and supported by, oral testimony. (*l*) Thus, in the case of a contract for work and services, if the names of the contracting parties are not mentioned, or the price to be paid for the work is not specified, or the quantity not named, and the writing

(*h*) *Goss v. Ld. Nugent*, 5 B. & Ad. 855 36 L. J., Q. B. 175; 37; Id. 65. *Stead v. Dawber*, 10 Ad. & E. 77.

65. *Crowley v. Vitty*, 21 L. J., Ex. 135. (*l*) *Jeffery v. Walton*, 1 Stark. 267.

(*i*) *Noble v. Ward* 36 L. J., Ex. 91; *Eden v. Blake*, 13 M. & W. 618. *Bolkow v. Seymour*, 17 C. B., N. S. 107.

(*k*) *Ogle v. Lord Vane*, L. R., 2 Q. B. 275; Id. 3 Q. B. 272; 7 B. & S. *Stones v. Dowler*, 29 L. J., Ex. 122. *Malpas v. London & S. W. Ry. Co.*, L. R., 1 C. P. 336; 35 L. J., C. P. 166.

consequently does not amount to a contract, oral proof of the additional facts and circumstances necessary to constitute a contract and give effect to the transaction is admissible. Such evidence does not alter or add to an existing contract, as no contract exists independently of it. (*m*) An invoice made out after a sale of goods has been effected is not conclusive evidence that the parties named in it as the contracting parties are really the contracting parties; but oral evidence is admissible to show that a party named therein as a vendor was not in reality the vendor. (*n*) Where the plaintiff signed a consignment note, which stated that certain goods were delivered by him to a railway company to be carried to N, but the charge for carriage was not mentioned, and oral evidence was given that the company's agreement with the plaintiff before the note was signed was to carry to K, but that the plaintiff did not read the note, and that the sum to be charged, and which was paid, was for the carriage to K, it was held that the evidence was admissible on the ground that the note was not a complete contract. (*o*) A document purporting to be a contract, signed by the parties, is not necessarily so and it is competent for either of the parties to show by parol evidence that it was not their intention in signing it that it should operate as a contract, and that the real contract between them was not in writing. (*p*) And generally oral evidence is admissible for the purpose of showing that the real contract between the parties is not in writing, and that a subsequent written contract does not contain, and was not

(*m*) *Knapp v. Harden*, 1 Gale, 47.
Ingram v. Lee, 2 Campb. 521.

(*n*) *Holding v. Elliott*, 5 H. & N.
 217; 29 L. J., Ex. 134.

(*o*) *Malpas v. London & S. W. Ry.*

Co., L. R., 1 C. P. 336; 35 L. J., C.
 P. 166.

(*p*) *Rogers v. Hadley*, 2 H. & C.
 227; 32 L. J., Ex. 241.

intended to contain, the whole agreement between them. (q)¹ But, where a written proposal, signed by the defendant, was adopted in terms by the plaintiff though not in writing, it was held that evidence of what passed at the time of making the proposal was not admissible for the purpose of varying the construction of the writing. (r) Oral evidence is always admissible for the purpose of identifying the subject-matter of the contract, as, for instance, to show that a contract referring to a bill as of the 24th of October was

(q) *Harris v. Rickett*, 4 H. & N. 1; (r) *Hotson v. Browne*, *ante*, p. 28 L. J., Ex. 197. 368.

¹ *Letcher v. Letcher*, 50 Mo. 137; *Washington Ins. Co. v. St. Mary's Seminary*, 52 Id. 480; *McClelland v. James*, 33 Iowa, 571; *Bell v. Woodman*, 60 Me. 465; *Allen v. Sowerby*, 37 Md. 410; *Babbett v. Young*, 51 N. Y. 237; *Willis v. Fernald*, 33 N. J. L. (4 Vr.) 206; *Howlett v. Howlett*, 56 Barb. 467; *Donley v. Findall*, 32 Tex. 43; *Martin v. Clark*, 8 R. I. 389; *Suffern v. Butler*, 21 N. J. Eq. 410; *De Coolff v. Crandall*, 1 *Sweeney* (N. Y.) 556; *Black v. Columbian Ins. Co.* 42 N. Y. 393; *Richards v. Schlegelmich*, 65 N. C. 150; *Foster v. McGraw*, 64 Pa. St. 464; *Anthony v. Atkinson*, 2 *Sweeney*, 228; *Leppoc v. National, &c. Bank*, 32 Md. 136; *Moore v. State*, 3 Heisk. 493; *Brower v. Bowers*, 1 Abb. (N. Y.) App. Dec. 214; *Grimes v. Harmon*, 35 Ind. 198; *McCray v. Lepp*, Id. 116; *Puckman v. Ransom*, 35 N. J. L. 565; *McDermott v. Hoffman*, 70 Pa. St. 31; *Commonwealth v. Moran*, 107 Mass. 239; *Langdon v. Hughes*, 107 Id. 272; *Mayor, &c. of N. Y. v. Exchange Fire Ins. Co.* 3 Abb. (N. Y.) App. Dec. 261; *Bultes v. Repp*, Id. 78; *Donnell v. Humphreys*, 1 Mon. T. 518; *King v. Fink*, 51 Mo. 209; *Means v. De la Vergne*, 50 Id. 343; *Miller v. McCoy*, Id. 214; *Slosson v. Hall*, 17 Minn. 95; *Clarke v. Lancaster*, 36 Md. 196; *Smith v. Dallas*, 35 Ind. 255; *Ball v. Benjamin*, 56 Ill. 105; *Borland v. Walrath*, 33 Iowa, 130; *Bancroft v. Grover*, 23 Wis. 463; *Orton v. Harvey*, Id. 99; *Durham v. Gill*, 48 Ill. 151; *Nanderkan v. Thompson*, 19 Mich. 82; *Lancan v. Phoenix, &c. Ins. Co.* 56 Me. 562; *Robinson v. McNiell*, 51 Ill. 225; *Kimball v. Myers*, 21 Mich. 275; *Elston v. Kennicott*, 52 Ill. 272; *Hammond v. Hannin*, 21 Mich. 374; *Swekham v. Stockham*, 32 Md. 196; *Selby v. Friedlander*, 22 La. Ann. 381.

intended to apply to one dated the 25th, (*s*) or to explain what was meant by the words "your wool" in a contract for the purchase of wool so described, (*t*) or the words "your employ" in a contract of service, (*u*) or the words "the lease" in an agreement to procure a lease. (*x*) In equity a defendant may prove a parol variation or addition to a written contract, where he is resisting specific performance of the contract; and a plaintiff may also make use of a parol variation, where there has been such a part performance of the parol portion of the agreement, as would enable the court to decree a specific performance in the case of an original and independent agreement, or where the omission has occurred by fraud, or, in cases not within the statute of frauds, by clear mistake. (*y*)¹

244. Annexation of agricultural and mercantile customs.—Customary rights and incidents, universally attaching to the subject-matter of the contract in the place and neighborhood where the contract was made, are impliedly annexed to the written language and terms of the contract, unless the custom is particularly and expressly excluded. Parol evidence of custom and usage, consequently, is always admissible to enable us to arrive at the real meaning of the parties, (*z*)²

(*s*) *Way v. Hearn*, 13 C. B., N. S. 292; 32 L. J., C. P. 34.

(*t*) *Macdonald v. Longbottom*, 1 Ell. & Ell. 977; 28 L. J., Q. B. 293; 29 Id. 259.

(*u*) *Mumford v. Gething*, 7 C. B., N. S. 305; 29 L. J., C. P. 105.

(*x*) *Horsey v. Graham*, L. R., 5 C. P. 9; 39 L. J., C. P. 58.

(*y*) *Woolam v. Hearn*, 2 W. & T. Lead. Cas. in Eq., 2nd ed., p. 404. *Laver v. Fielder*, 32 Beav. 1.

(*z*) *Hutton v. Warren*, 1 M. & W. 475, 476. *Domat*, liv. 1, tit. 1. *Wig-*

¹ So parol evidence can not be received to show that by the general term "nephews," a testator meant to include illegitimate nephews. But if it be shown that he had no legitimate nephews, the ambiguity would be explainable by parol evidence. *Brower v. Bowers*, 1 Abb. (N. Y.) App. Dec. 214.

² *Harris v. Rathbun*, 2 Abb. (N. Y.) App. Dec. 326.

but not to prevail over and nullify the express provisions and stipulations of the contract. (*a*) The known and received usage of a particular trade or profession and the established course of every mercantile or professional dealing, are considered to be tacitly annexed to the terms of every mercantile or professional contract made in the ordinary course of business in which the usage prevails, (*b*) if there be no words therein expressly controlling or excluding the ordinary operation of the usage; and parol evidence thereof may, consequently, be brought in aid of the written instrument. (*c*) The principle on which the evidence is admitted is, that the parties have set down in writing those only of the terms of the contract which were necessary to be determined in the particular case, leaving to implication and tacit understanding all those general and unvarying incidents which a uniform usage would annex, and according to which they must be considered to contract, unless they expressly exclude them. (*d*) Whether the terms of the contract are such as to exclude evidence of the custom is a question for the judge and not for the jury. (*e*) A local custom or usage of a particular place, or of a particular class of persons, is not binding upon persons living at a dis-

glesworth *v.* Dallison, 1 Doug. 201; 1 Smith's L. C., 5th ed., p. 520.

(*a*) Clarke *v.* Roystone, 13 M. & W. 752; 14 L. J., Ex. 143. 2 Taylor on Ev. p. 1026, 5th ed. Blackett *v.* R. Ex. Ass. Co., 2 C. & J. 249. Roxburgh *v.* Robertson, 2 Bligh, 156. Roberts *v.* Barker, 1 C. & M. 808. Phillips *v.* Briard, 1 H. & N. 21. Cuthbert *v.* Cumming, 24 L. J., Ex. 200.

(*b*) Allan *v.* Sundius, 1 H. C. 123, 31 L. J., Ex. 307.

(*c*) Syers *v.* Jonas, 2 Exch. 111. Grant *v.* Maddox, 15 M. & W. 737.

Bourne *v.* Gatliffe, 3 Sc. N. R. 40.

(*d*) Humfrey *v.* Dale, 26 L. J., Q. B. 140; 7 Ell. & Bl. 266. Lucas *v.* Bristow, 27 Id. Q. B. 364; Ell. Bl. & Ell. 907. Reg. *v.* Stoke-upon-Trent, 13 L. J., M. C. 41. Brown *v.* Byrne, 3 Ell. & Bl. 715. Cuthbert *v.* Cumming, 10 Exch. 815. Field *v.* Lelean, 6 H. & N. 617; 30 L. J., Ex. 168. Myers *v.* Sarl, 30 L. J. Q. B. 9; 3 Ell. & Ell. 306. Fleet *v.* Murtan, L. R., 7 Q. B. 126; 41 L. J., Q. B. 49.

(*e*) Parker *v.* Ibbetson, 4 C. B., N. S. 355; 27 L. J., C. P. 236.

tance, and who are proved to have been wholly unacquainted with such usage. (*f*) But, if a merchant residing in London employs an agent in Liverpool to make a contract there, the contract so made will be clothed with all the incidents of a Liverpool contract in respect of custom and usage of trade. (*g*) Where the written contract does not exclude the custom, oral evidence is not admissible for the purpose of showing that the parties did not intend it to apply. (*h*) Oral evidence is admissible to show that, by the custom of a particular trade, persons describing themselves in the contract as "agents to merchants" are personally liable, if they do not disclose their principals within a reasonable time. (*i*)

245. *Customary meaning of particular words.*—

If, by the known usage of trade or by custom, a word has acquired, in respect of the subject-matter of the contract, a peculiar sense and meaning different from the ordinary popular sense and meaning, evidence is admissible to show that the parties used the word in its customary trade acceptation, and not in the ordinary popular sense.¹ Thus, the word thousand in certain trades comprehends a larger number of units than it does in its ordinary acceptation. In the herring trade, for example, six score herrings go to the hundred, and sixty to the thousand (3 Ed. 3, statute 2, cap. 2); and parol evidence is consequently admissible to show that the word "thousand," when

(*f*) *Ld. Tenterden, C. J., Bartlett v. Pentland*, 10 B. & C. 770.
Kirchner v. Venus, 12 Moore, P. C. 399.
Sweeting v. Pearce, 30 L. J., C. P. 109; 9 C. B. N. S. 534.

(*g*) *Graves v. Legg*, 2 H. & N. 213; 26 L. J., Ex. 316.

(*h*) *Fawkes v. Lamb*, 31 L. J., Q. B. 98. But see *Burges v. Wickham*, 33 Id. 17.

(*i*) *Hutchinson v. Tatham*, L. R., 8 C. P. 482.

¹ *Harris v. Rathbun*, 2 Abb. (N. Y.) App. Dec. 326; *Swett v. Shumway*, 102 Mass. 365.

applied to herrings, in the contracts of herring-dealers, mean twelve hundred. In a lease of a rabbit warren, parol evidence was admitted to show that by the custom of the country where the lease was made, in taking an account of the rabbits on a rabbit warren, the numbers were computed at one hundred dozen a thousand; and the word "thousand" in a lease as applied to rabbits was consequently construed to mean one hundred dozen, or twelve hundred. (*k*) So, where an insurance was effected "to any port in the Baltic," evidence was admitted to show that the Gulf of Finland is considered, by universal custom and consent amongst merchants and in mercantile contracts, to be within the Baltic, though the two seas are treated as distinct by geographers. (*l*) And in a lease of a coal mine, evidence was admitted to show that the word "level" in mining districts had a meaning different from the ordinary popular meaning, and that the word was used by the parties to the contract in the sense in which it is ordinarily employed by miners. (*m*) But the custom and usage must be general and universal, and not the practice or course of dealing of a particular firm or house of trade, such as the usage of Lloyd's. (*n*)¹

246. *Terms of art.—Trade acceptations.*—The meaning of all words and terms of art and specifications of quantity, quality, weight, and measure, are regulated and controlled by local custom, unless the terms have been selected, and a definite meaning given to them by the legislature. (*o*) But, to vary

(*k*) *Smith v. Wilson*, 3 B. & Ad. 728.

(*m*) *Clayton v. Gresson*, 4 Ad. & E. 302.

(*l*) *Uhde v. Walters*, 3 Campb. 16.
Brough v. Whitmore, 4 T. R. 210.
Anderson v. Pitcher, 2 B. & P. 168.

(*n*) *Gabay v. Lloyd*, 3 B. & C. 797.
Sweeting v. Pearce, *ante*, p. 374.
(*o*) *Taylor v. Briggs*, 2 C. & P. 525.

¹ *Harris v. Rathbun*, 2 Abb. (N. Y.) App. Dec. 326.

the meaning of plain words, the existence of the custom must be "clear, cogent, and irresistible." (*p*) If there are peculiar expressions used in a contract, which have in a particular place or trade a known meaning attached to them, it is for the jury to say what the meaning of those expressions is, but for the court to decide what is the meaning of the contract. (*q*)

247. *Oral evidence of conditional assent.*—If two parties sign a memorandum of a contract upon the strength of a clear oral agreement that the writing is not to be binding until the happening of a given event, and the event never happens, there is no contract. (*r*) Where a party claims as the indorsee of a bill of exchange, it may be shown that the alleged indorser wrote his name on the bill, and delivered it to the alleged indorsee for a particular purpose, and on the understanding that it should not operate as an indorsement until a condition was fulfilled. (*s*) And, if an oral agreement and an agreement in writing have been made, whether contemporaneously or not, upon two distinct independent matters, and the one does not conflict with, or alter the other, both may stand; and the oral bargain may be enforced as well as the contract in writing. (*t*) When the contract is evidenced by letters and writings, it is for the court to

Hutchison v. Bowker, 5 M. & W. 535.

Spicer v. Cooper, 1 Q. B. 424.

(*p*) Lewis v. Marshall, 13 L. J., C. P. 193.

(*q*) Hutchison v. Bowker, 5 M. & W. 542. Neilson v. Harford, 8 Id. 823. Trueman v. Loder, 11 Ad. & E. 599. Sotilichos v. Kemp, 18 L. J., Ex. 36; 3 Ex. 105.

(*r*) Pym v. Campbell, 6 Ell & Bl. 370; 25 L. J., Q. B. 277. Rogers v. Hadley, *ante*, p. 371. Lindley v. Lacy,

34 L. J., C. P. 9; 17. C. B., N. S. 578.

Wallis v. Littell, 11 C. B., N. S. 369;

31 L. J., C. P. 100. Davis v. Jones, 17 C. B. 634.

(*s*) Bell v. Ld. Ingestry, 12 Q. B. 317; Bannerman v. White, 31 L. J., C. P. 28.

(*t*) Lindley v. Lacy, *ante*, p. 368. White v. Parkin, 12 East, 578. Harris v. Rickett, *ante*, p. 371. Green v. Saddington, 7 Ell & Bl. 503. Morgan v. Griffith, *ante*, pp. 367-368.

interpret them, and determine whether they do or do not amount to a concluded contract; and, if the judge leaves it to a jury to say what is the effect and meaning of written correspondence, there is a misdirection. (*u*)

248. *Estoppel by deed*.—The rule of law which stops a party from disputing or contradicting what he has affirmed or declared by deed¹ does not, of course, extend to strangers to the contract. (*x*) A party to a deed, moreover, is not estopped in an action by another party not founded on the deed, and wholly collateral to it, from disputing the truth of certain facts recited and set forth in such deed. (*y*) When a recital in a deed is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But, where it is intended to be the statement of one party only, the estoppel is confined to that party; and the intention is to be gathered from construing the whole instrument. (*z*) As between the parties themselves, any averment of a fact made by one of the parties, in the nature of a representation or warranty to the other, may be contradicted and shown to be false, by that other. (*a*) But the party who makes the averment is not permitted to contradict or dispute the fact recited. (*b*) If a lease, however, recites that the lessor is possessed of real or personal property, the

(*u*) *Cheveley v. Fuller*, 13 C. B. 122. Woodward, 5 Ex. 557; 20 L. J., Ex.

(*x*) *Rex v. Scammonden*, 3 T. R. 264.
474.

(*y*) *Carpenter v. Buller*, 8 M. & W. 411. Hayne v. Maltby, 3 T. R. 441
309. Vin. Abr. Estoppel, M. 455.

(*z*) *Stroughill v. Buck*, 14 Q. B. 309. Oldham v. Langmead, cited 3
787; 19 L. J. Q. B. 209. Wiles v. J., Q. B. 350; 12 Q. B. 310.
T. R. 439. Humble v. Hunter, 17 L.

¹ *Ante*, p. 46, and see *Goodell v. Bennett*, 22 Wis. 563; *Avery v. Judd*, 21 Id. 262; *Winterfield v. Stauss*, 24 Id. 394, *Woodman v. Clapp*, 21 Id. 350, 355.

lessee who executes and accepts such lease is estopped, during the continuance of his occupation, from denying the title and possession of his lessor at the time such lease was executed. (c)

249. *Estoppels in pais* arise "where a party by his words or conduct willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, and alter his own previous position." A party who has so acted is said to be estopped before the country, and precluded from falsifying his own representation. (d)¹ If one party dealing with another puts forth a sealed instrument as his deed, or if he represents it to be a binding obligation which he has himself executed, he cannot be heard in any court of law or equity to say, as against a party who has dealt with him on the faith of the correctness of the representation, that the instrument is not his deed, or that he never executed it, or that it is not a binding obligation. (e) An acceptor *supra* protest, for the honor of the drawer, is estopped from saying in an action against him by an indorsee, that the name of payee was fictitious. (f) If on the evidence it appears that two persons upon the negotia-

(c) *Beckett v. Bradley*, 8 Sc. N. R. 843; 7 M. & Gr. 995.

(e) *Straffon, ex parte*, 22 L. J., Ch. 202.

(d) *Pickard v. Sears*, 6 Ad. & E. 474. *M'Cance v. Lond. & N. W. Rail. Co.*, 34 L. J., Ex. 39; 3 H. & C. 343.

(f) *Phillips v. im Thurn*, 18 C. B., N. S. 694; 35 L. J., C. P. 220.

¹ See *Lathrop v. Knapp*, 27 Wis. 215; *Ford v. Smith*, Id. 261; *Winchell v. Edwards*, 57 Ill. 41; *Leeper v. Hersman*, 58 Id. 218; *Davidson v. Silliman*, 24 La. Ann. 225; *Miller v. Springer*, 70 Pa. St. 269; *Dean v. Martin*, 24 La. Ann. 103; *Trowbridge v. Matthews*, 28 Wis. 656; *Mahaska, &c. R. R. Co. v. Des Moines R. R. Co.* 28 Ill. 437; *Erie Ry. Co. v. Delaware, &c. R. R. Co.* 21 N. J. Eq. 283; *Favill v. Roberts* 3 Lans. (N. Y.) 14; *Waddle v. Morrill*, 26 Wis. 611; *Hall v. Milwaukee Dock Co.* 23 Id. 276; 29 Id. 482.

tion of a mercantile security have assumed by common consent a certain fact, such as that a particular person is the drawer of a bill, or if by express agreement between them a bill is drawn and indorsed by procuration in the name of a fictitious or dead person, and the position of one of the parties has been altered on the faith of the arrangement, the other cannot afterwards be permitted to say that the bill was not drawn or indorsed as it purports to be. (*g*)

250. Contradictible averments in written contracts not under seal.—Although the express admissions of a party inserted in a contract are strong evidence against him, yet he is at liberty, in certain cases, when the contract is not under seal, to prove that such admissions were mistaken or untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition, when the party is estopped, as we have seen, from disputing their truth with respect to that person and that transaction; (*h*) and this rule or principle of law is applicable to mistakes in respect of legal liability, as well as in respect of matter-of-fact. (*i*)¹ If a bill of exchange or promissory note purports, on the face of it, to be made for value received, it is competent to the parties to show that no value was received; (*k*) and, if a receipt or acknowledgment of the payment of money has been given, oral evidence is admissible to contradict such receipt or acknowledgment, and rebut its legal operation as a discharge from liability. (*l*)

(*g*) *Ashpitel v. Bryan*, 32 L. J., Q. B. 95; 3 B. & S. 474.

(*h*) *Heane v. Rogers*, 9 B. & C. 586.

(*i*) *Newton v. Libbiard*, 18 L. J., Q. B. 56.

(*k*) *Foster v. Jolly*, 1 C. M. & R. 708. *Ribout v. Bristow*, 1 C. & I. 231.

(*l*) *Lampon v. Corke*, 5 B. & Ald.

611. *Skaife v. Jackson*, 3 B. & C.

423. *Farrar v. Hutchinson*, 9 Ad. &

E. 643. *Wallace v. Kelsall*, 7 M. &

W. 274. 274. *Graves v. Key*, 3 B. &

Ad. 313. *Bowes v. Foster*, 2 H. & N.

779.

¹ See *Anderson v. Coburn*, 27 Wis. 558.

So, where a passenger who was injured by a railway accident, accepted £400, and gave the company a receipt expressed to be in full discharge of his claims, it was held that the statement in the receipt could be rebutted by evidence that he did not receive the money in full satisfaction of all demands. (*m*)¹

(*m*) *Lee v. Lancashire & Yorkshire Railway Co., L. R., 6 Ch. 527.*

¹ See *Duinneen v. Reich*, 22 Wis. 550; *Mariner v. Milwaukee, &c. Ry. Co.* 26 Id. 84.

CHAPTER III.

OF THE AVOIDANCE OF CONTRACTS.

SECTION I.

• VOID CONTRACTS.

251. *Of immoral contracts.*—Whenever a contract has been entered into for the performance of an immoral act, or an act which is contrary to the provisions of an act of parliament, or to the public policy of the common law, the courts will not lend their assistance for the enforcement of the contract; (a)¹ and a deed will be set aside where the consideration is immoral. (b)² If the illegality of the contract appears

(a) *Holman v. Johnson*, 1 Cowp. 343. *Fivaz v. Nicholls*, 2 C. B. 501; 15 L. J., C. P. 125. Cod. lib. 2, tit. 3, lex. 6. (b) *Willyams v. Bullmore*, 32 Beav. 574; 33 L. J., Ch. 461.

¹ *Clements v. Morston*, 52 N. H. 31; *Erie Ry. Co. v. Union, &c. Express Co.* 35 N. J. L. 240; *Bixby v. Moor*, 51 N. H. 402; *The Pioneer*, Deady, 72; *Berrill v. Gibbs*, 1 Pa. L. Jour. R. 313; *Walrous v. Blair*, 32 Iowa, 58. So an agreement for blockade-running, made during the rebellion of 1861-65, is void (*Hancock v. Moore*, 23 La. Ann. 517). Or for goods sold in aid of the rebellion (*Hanauer v. Doane*, 12 Wall. 342; *Thomas v. Richmond*, Id. 349; *Bibb v. County Commissioners*, 44 Ala. 119; *Huson v. Roberts*, 40 Ga. 30; *Holt v. Barton*, 42 Miss. 711; *Commonwealth v. Chalkley*, 20 Gratt. 404; *Oxford Iron Co. v. Quinchett*, 44 Ala. 489; *Smith v. Barston*, 2 Doug. (Mich.) 155.

² *Howell v. Fountain*, 3 Ga. 176; *Denton v. Irwin*, 6 La. Ann. 317; *Hertz v. Wilder*, 10 Id. 199; *Summerlin v. Living-*

upon the face of it, it is at once fatal to an action thereon; and, if it does not so appear, the fact of its existence may be established through the medium of parol or oral testimony. But "illegality is never presumed; on the contrary, everything must be presumed to have been legally done till the contrary be proved." (c) Bonds, agreements, and guarantees to indemnify persons against the consequences of their illegal acts, are absolutely null and void, whether the parties giving the bond or indemnity did or did not know of the illegality of the transaction. (d) Such are contracts to indemnify a man against the consequences of publishing a libel, (e)¹ or to indemnify a sheriff, or other ministerial officer of the law, against the pecuniary consequences resulting to himself from his permitting a prisoner to go at large, or committing any other breach of duty; (f) or a promise to pay a man a sum of money "in consideration that he will beat another out of such a close"; (g) or to save

(c) *Bennett v. Clough*, 1 B. & Ail.

463. *Broom's Maxims* 427. French

Cod. Civ. liv. 3. s. 1, 1116.

(d) *Duvergier v. Fellows*, 10 B. & C. 826.

(e) *Shackell v. Rosier*, 2 Bing. N

C. 634; 3 Sc. 59.

(f) *Featherston v. Hutchinson*, Cro.

Llitz. 199. *Morris v. Chapman*, Jones, 24.

(g) *Allen v. Rescous*, 2 Lev. 174.

ston, 15 Id. 519; *White v. Hunter*, 23 N. H. (3 Fost.) 128; *Denton v. English*, 2 Nott & McC. 581; *Worcester v. Eaton*, 11 Mass. 368; *Balder v. Stratton*, 11 Pa. St. 316). The price of board and lodging of prostitutes is not recoverable. *Mackbee v. Griffith*, 2 Craich, 336.

¹ *Arnold v. Clifford*, 2 Sumn. 238. See *Howe v. Buffalo*, &c. R. R. Co. 38 Barb. 124; *St. John v. St. John's Church*, 15 Id. 346. But indemnity against the consequences of an illegal act already done is binding (*Griffiths v. Hardenburgh*, 41 N. Y. 469; *Doty v. Wilson*, 14 Johns. 379; *Keenland v. Rogers*, 2 Hall, 579; *Given v. Driggs*, 1 C. Cas. 381). If executed, courts will leave the parties as they find them. *Worcester v. Eaton*, 11 Mass. 368; *Denton v. English*, 2 Nott & McC 581; *Summerlin v. Livingston*, 15 La. Ann. 317.

him harmless in consideration that he will confine and imprison another; (*h*) but an agreement to surrender a third party into the custody of the sheriff is not necessarily illegal. (*i*) Where the defendant contracted to let rooms to the plaintiff, but afterwards, on discovering that they were intended to be used for the delivery of lectures of a blasphemous character, refused to allow the use of them, it was held that the purpose was illegal, and that the contract could not be enforced by law. (*k*)¹

252. *Contracts tending to promote fornication and prostitution* are null and void as being contra bonos mores, such as bonds, covenants, promissory notes, or securities for the payment of money, given to a woman in order to induce her to commit fornication or to live in a state of concubinage or prostitution, (*l*) or to secure a maintenance to a married woman in order that she may be induced to leave her husband and carry on an illicit intercourse with another man; (*m*)² but, if a man covenants to pay an annuity to a woman in consideration of past cohabitation, or gives her a bond to secure to her the payment of money for her support or the support of her children, the contract is valid, and an action may be maintained upon it. (*n*)²

(*h*) *Fletcher v. Harcott*, Hut. 55. *Walker v. Perkins*, 3 Burr. 1568.

(*i*) *Lewis v. Davison*, 4 M & W. *Friend v. Harrison*, 2 C. & P. 584.

657. (*m*) *Evans v. Carrington*, 30 L. J.

(*k*) *Cowan v. Milbourn*, L. R., 2 Ex. Ch. 370.

230; 36 L. J., Ex. 124.

(*n*) *Gibson v. Dickie*, 3 M. & S.

(*l*) *Robinson v. Cox*, 9 Mod. 263. 463. *Turner v. Vaughan*, 2 Wils. 339

¹ See *Morgan on the Law of Literature*, vol. 1, p. 49.

² Even though the contract has been performed on the part of the woman (*Walker v. Gregory*, 36 Ala. 180; *Urnebenner v. Weisiger*, 3 T. B. Bon. 35; *Sherman v. Barrett*, 1 McMill (S. C.) 147; *Singleton v. Bremar*, Harp. (S. C.) 201). And so a promise of marriage, in consideration of illicit intercourse, has been held void. *Buldy v. Swatton*, 11 Pa. St. 316.

³ But see *Id.*

The contract, however, must be made by deed, past cohabitation and seduction being, as we have already seen, an insufficient consideration for the support of a simple contract or promise. (*o*) A contract by the mother of a bastard child to release the putative father, in consideration of a present money payment, from all further payments in respect of the child, is not void in law; but neither is it a bar to the jurisdiction of the magistrate to make an order of affiliation on the father, such order being, under the statute, for the benefit of the child, and not of the mother exclusively. (*p*)¹ If a landlord knowingly permits a female lodger to carry on the trade of prostitution under his roof, the courts will give him no assistance for the recovery of his rent. (*q*)² One who makes a contract for sale or hire, with the knowledge that the other contracting party intends to apply the subject-matter of the contract to an immoral use, cannot recover upon the contract; and it is not necessary that he should expect to be paid out of the proceeds of the immoral act. Thus, where coachbuilders, knowing a woman to be a prostitute supplied her with a brougham with a knowledge that it would be, as in fact it was, used by her as part

Nye v. Moseley, 6 B. & C. 133; 9 D. & R. 165. *Annandale v. Harris*, 2 P. Wms. 432. *Priest v. Parrott*, 2 Ves. senr. 160. *Knye v. Moore*, 1 S. & S. 61; 2 Id. 260. (*o*) *Beaumont v. Reeve*, 8 Q. B. 483; 15 L. J. Q. B. 141. *Matthews v. L—e*, 1 Mad. 558. (*p*) *Follit v. Koetzow*, 2 Ell. & Ell. 730; 29 L. J., M. C. 128. (*q*) *Jennings v. Throgmorton*, R. & M. 251. *Girardy v. Richardson*, 1 Esp. 12. And see *Smith v. White*, L. R., 1 Eq. 626; 35 L. J., Ch. 454.

¹ And so a promise, by a putative father, to pay for the board of a woman and her bastard child is void (See *Trovinger v. McBurney*, 5 Cow. (N. Y.) 253). But where a ward, who had a child by her guardian, and agreed to settle property upon it, it was held not to be per se void. *Flanigan v. Garrison*, 28 Ga. 136.

² *Mackbee v. Griffith*, 2 Cranch, 336.

of her display to attract men, it was held that they could not recover the price, although there was no evidence that they looked expressly to the proceeds of her prostitution for payment. (r) But "a prostitute must have a lodging as well as other people;" and, if she merely uses the lodgings to live in and plies her trade elsewhere, there is no answer to the landlord's claim for his rent. (s) Where an action was brought for the charges of washing a variety of expensive dresses and numerous gentlemen's nightcaps, and it appeared that the dresses were used by the defendant for the purpose of enabling her to decoy gentlemen to her bed, and the nightcaps for those gentlemen to sleep in when she got them there, and the plaintiff was aware of the uses to which the dresses and nightcaps were applied, it was held that the plaintiff was nevertheless entitled to recover for the washing. "This unfortunate woman" (the defendant), observes Buller, J., "must have clean linen; and it is impossible for the court to take into consideration which of these articles were used for an improper purpose and which were not." (t) A shopkeeper cannot recover the price of immoral or obscene prints and libels sold by him; (u) and a printer cannot bring an action against a publisher for the price agreed to be paid for printing an indecent, libelous, and immoral history, setting forth the amours and intrigues of a prostitute.¹ Every servant and workman, "to the lowest," knowingly engaged in putting forth such a work to the public, is prevented from suing for compensation. (x)

(r) *Pearce v. Brookes*, L. R., 1 Ex. 213; 35 L. J., Ex. 134; 4 H. & C. 358.

(s) *Crisp v. Churchill*, cited 1 B. & P. 340.

(t) *Lloyd v. Johnson*, 1 B. & P. 340.

(u) *Fores v. Jones*, 4 Esp. 97.

(x) *Poplett v. Stockdale*, 2 C. & P. 200.

¹ See *Morgan on the Law of Literature*, vol. i. pp. 27 et seq.

253. *Contracts against public policy.*—"By the 36 Vict. c. 12, s. 2, no agreement contained in any separate deed, made between the father and mother of an infant or infants, shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother; provided always, that no court shall enforce any such agreement if the court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto." A covenant by a father that he will abstain from seeing or exercising any control over his children is void as being contrary to the policy of the law, (*y*) unless the father has, by gross misconduct, manifested himself unfit to associate with them. (*z*) But a bond given by the father of illegitimate children to the mother, to secure her an annuity in condition of her giving up the care and custody of the children, is legal, and may be enforced. (*a*) A promise, by a client to his solicitor, to make him a present beyond the scale of ordinary legal remuneration, is void, as being contrary to the public policy of the law; (*b*) and so are all contracts between solicitors and clients for the purchase of property from the client; (*c*)¹ and all contracts

(*y*) *Vansittart v. Vansittart*, 4 K. & J. 62; 2 De G. & J. 249; 27 L. J., Ch. 289. *Hamilton v. Hector*, L. R. 6 Ch. 701; 40 L. J. Ch. 692.

(*z*) *Swift v. Swift*, 34 L. J., Ch. 209, 394; 34 Beav. 266.

(*a*) *In re Plaskett's Estate*, 30 L. J., Ch. 606.

(*b*) *O'Brien v. Lewis*, 4 Giff. 221; 32 L. J., Ch. 569. *Tyrrel v. Bk. of London*, 10 H. L. C. 26; 31 L. J., Ch. 396. *Pince v. Beattie*, 32 Id. 734. But see now the 33 & 34 Vict. c. 28, by which agreements in writing between

solicitors and their clients, as to the remuneration of the former, are legalized, subject to examination and allowance by a taxing-master. By sect. 11, an agreement for payment only in the event of success, is void; but it has been held that an agreement to charge nothing if the action was lost, and to take nothing for costs out of any money recovered in such action was not void, and did not need to be in writing. *Jennings v. Johnson*, L. R., 8 C. P. 425.

(*c*) *Post*, p. 204.

¹ *Lathrop v. Amherst Bank*, 9 Metc. 489; *Thurston v. Per*

prejudicial to the interests of the public, such as a contract tending to prevent free competition, (*d*) to influence improperly the performance of public duties, or having for its object the purchase or acquisition by money of a dignity or title of honor in the gift of the crown. (*e*) A contract with a candidate for a seat in parliament, to supply meat and drink to the electors of a borough, is illegal and void, as tending to bribery and corruption, and being contrary to the public policy of the law; and so is every description of contract, with whomsoever made, which has for its object the inducing of the voters at an election to vote in favor of any particular individual. (*f*)¹ If money is lent to an elector as an inducement to him to give his vote, it cannot be recovered back; nor can

(*d*) *Hilton v. Eckersley*, 6 E. & B. 64.

(*f*) *Thomas v. Edwards*, 2 M. &

(*e*) *Egerton v. Earl Brownlow*, 4 H. W. 218.

L. C. 235; 18 Jur. 71.

ceval, 1 Pick. 415; *Redman v. Sanders*, 2 Dana (Ky.) 70; *Frost v. Paine*, 12 Me. (3 Fairf.) 111; *Lafferty v. Jelley*, 22 Ind. 471; and *post*, note 1, p. 195; *Brown v. Beauchamp*, 57 B. Mon. 413; *Knight v. Sawin*, 6 Metc. (Greenl.) 361; *Thompson v. Warren*, 8 B. Mon. 488; *Arden v. Patterson*, 5 Johns. 44; *McMicken v. Perrin*, 18 How. 507; *Burt v. Place*, 6 Cow. 431; *Gilleland v. Failing*, 5 Den. 308; *Gidding v. Eastman*, 1 Clark (N. Y.) 19; *Sedgwick v. Stanton*, 14 N. Y. 289; *Brotherston v. Consalaus*, 26 How. Pr. 213; *Martin v. Amos*, 13 Ired. L. (N. C.) 201; *Barnes v. Strong*, 1 Jones, Eq. (N. C.) 100; *Spencer v. King*, 5 Ohio, 183; *Ryan v. Martin*, 16 Wis. 57; *Moore v. Campbell Academy*, 9 Yerger, 115; *Byrd v. Odem*, 9 Ala. 755; *Scobey v. Ross*, 13 Ind. 177; *Coquelland v. Bearss*, 21 Id. 479; *Slader v. Rhodes*, 2 Dev. & B. Eq. (N. C.) 24; *Weedon v. Wallace*, Meigs (Tenn.) 286; *Stone v. Connelly*, 1 Metc. (Ky.) 625.

¹ *Frost v. Belmont*, 6 Allen, 152; *Marshall v. Baltimore, &c. R. R. Co.* 16 How. 314; *Gill v. Davis*, 12 La. Ann. 219; *Willey v. Collier*, 17 Md. 273; *Sedgwick v. Stanton*, 14 N. Y. 289; *Bryan v. Reynolds*, 5 Wis. 200; *Brown v. Brown*, 34 Barb. 533; *Clipping v. Hepbaugh*, 5 Watts & S. 315; *Powers v. Skinner*, 34 Vt. 274.

any security given for its repayment be enforced. A contract with a member of the legislature to induce him to vote in a particular way, placing his private interest in opposition to his public duty, is void; but a member of the legislature may make terms for the sale of his lands, and for compensation for injury he may sustain from the carrying out of an undertaking seeking parliamentary sanction. (g)¹

(g) Lord Howsden v. Simpson, 1 Rail. Cas. 347.

¹ See notes to pp. 385, 390, *post*, and Wilamouicz v. Adams, 13 Ark. 12; Belding v. Pitkin, 2 Cai. 147. And so Sunday contracts (Robeson v. French, 12 Metc. (Mass.) 24; Gregg v. Wyman, 4 Cush. 322; Barnard v. Tuphing, 32 Mo. 341; Sargeant v. Butts, 21 Vt. 99). To influence the action of officers (Stark v. Raney, 18 Cal. 622; McCartney v. Shepherd, 21 Mo. 573; Trundle v. Riley, 17 B. Mon. 396; Hodson v. Wilkins, 7 Me. (7 Greenl.) 113; Azer v. Hutchins, 4 Mass. 370; Churchill v. Perkins, 5 Id. 541; Denny v. Lincoln, Id. 385; Foster v. Clark, 19 Pick. 329; Shotwell v. Huncklin, 23 Miss. 156; Randle v. Harris, 6 Yerger, 509; Odineal v. Barry, 24 Miss. 9; Webber v. Blunk, 19 Wend. 188; Winter v. Kinney, 1 N. Y. (1 Comst.) 365; Hunter v. Agee, 5 Humph. (Tenn.) 57; Prewitt v. Garrett, 6 Ala. 128; Downs v. McGlinn, 2 Hilt. (N. Y.) 14; Devlin v. Brady, 32 Barb. 518; Cumpston v. Lambert, 18 Ohio, 81). And all contracts in contravention of statutes (Milton v. Hayden, 32 Ala. 30; Slantey v. Nelson, 28 Id. 514; Madison Ins. Co. v. Forsyth, 2 Ind. 483; Liter v. Sheets, 7 Id. 132; Ellsworth v. Mitchell, 31 Me. 247; Hall v. Mullin, 5 Har. & J. 193; Bayley v. Taber, 5 Mass. 286; Soloman v. Drescheer, 4 Min. 278; Downing v. Ringer, 7 Mo. 585; Hill v. Smith, 1 Mor. (Iowa) 70; Guiland v. Phillips, 1 S. C. 152; Cheekmore v. Chilwood, 7 Bush. 317; Travers v. United States, 5 Ct. of Cl. 329; Lender v. United States, 7 Id. 530; Jones v. Blackridge, 9 Kan. 562; McMahon v. Baden, 39 Conn. 316; Craft v. Bent, 8 Kan. 328; Moore v. Wade, Id. 380; Smith v. Albany, 7 Lans. (N. Y.) 114; Swords v. Owen, 34 N. Y. Superior Ct. (J. & S.) 277). And all contracts against public policy (Turner v. Smithers, 3 Houst. (Del.) 430; Neustadt v. Hall, 58 Ill. 72; Haas v. Fenlon, 8 Kan. 601; Southard v. Boyd, 51 N. Y. 177; Hunter v. Wolf, 71 Pa. St. 282; Delmas v. Insurance Co. 14 Wall. 661; Hanaur v. Woodruff, 15 Id. 439; O'Hara v. Carpenter, 23 Mich. 410;

254. *Contracts providing for the future separation of husband and wife* are contrary to public policy, and therefore void. (*h*) But a contract between the husband and a trustee on behalf of the wife, providing for the terms of a present separation, will be enforced. (*i*)¹

255. *Contracts in restraint of marriage* are void, as being opposed to public policy; (*k*) but a restriction against marriage with one specified person is not illegal. (*l*)

256. *Maintenance.*—Agreements to furnish money to be risked on the event of a law suit, or to aid and assist in the prosecution of law suits, in which the party making the agreement is in nowise interested, and with which he has no just or reasonable ground for interference, are void, as tending to keep alive strife and contention. (*m*) But, if the party has an interest in the thing in dispute, or has a fair and reasonable ground for thinking that he has rights in common with other parties, he may lawfully enter into an agreement with them for the prosecution or defense of those rights. (*n*) It is laid down in

(*h*) *Merryweather v. Jones*, 4 Giff. 509.

(*i*) *Gibbs v. Harding*, L. R., 5 Ch. 336; 29 L. J., Ch. 374.

(*k*) *Post* bk. 2, ch. 4.

(*l*) *Topham v. Duke of Portland*, 32 L. J. Ch. 81.

(*m*) 32 Hen. 8 c. 9. Plowd. 88. 2 Instit. 564. *Pierson v. Hughes*, Freem.

71, 81. *Earle v. Hopwood*, 30 L. J., C. P. 217; 9 C. B., N. S. 566.

(*n*) 4 Bl. Com. 134, 135. 2 Roll.

Abr. 115. *Findon v. Parker*, 11 M. & W. 682. Such relationship as that of

Skeels v. Phillips, 54 Ill. 309; *Stone v. Young*, 5 Kan. 229; *Guerther v. Dewein*, 11 Iowa, 133; *Reynolds v. Nichols*, 12 Id. 398). But the employment of counsel to assist the official attorney in a criminal prosecution is not against public policy, and the law will imply a promise by the employer to pay for such service. *Price v. Caperton*, 1 Duv. (Ky.) 207.

¹ And so an agreement that a defendant in a proceeding for divorce shall withdraw his or her papers, and make no defense in the case, is illegal. *Stoutenburg v. Sybrand*, 13 Ohio St. 288.

our old law books, that, for avoiding maintenance, rights of action cannot be assigned or granted over by one man to another. Thus, "if a man owe me money on an obligation or the like, I cannot grant this debt to another; but I may grant a letter of attorney to another man to sue for it and receive it, or I may grant the writing itself to another, and he may cancel it or give it to the obligor." (*o*) But the ancient rule had been so explained away at common law, that it remained only as an objection to the form of the action; and our courts of equity, considering that in a commercial country almost all personal property must necessarily lie in contract, protected the assignment of a chose in action as much as the law would that of a chose in possession. (*p*) Rights of action, debts, and claims to money due on contracts, may therefore now be purchased without making the purchaser guilty of maintenance. If, however, the purchaser gives an indemnity against all the costs that have been, or may be, incurred by the vendor in the prosecution of the suit, the contract will then amount to maintenance, and will consequently be void. (*q*)¹

257. Champerty.—When the party officiously and unwarrantably agreeing to furnish money, or to aid in the maintenance of the action or suit, is to share in the advantages thereof, he is said to be guilty of champerty (*campi partitio*), and the agreement is

a cousin is not sufficient to make such an agreement lawful. *Hutley v. Hutley*, L. R., 8 Q. B. 112. But a father may assist his son, a husband his wife, or a master his servant, without being guilty of maintenance.

(*o*) *Vin. Abr. Assignment* (B). (D.).

Bro. Abr. Chose in action. Co. Litt. 265, a.

(*p*) *Co. Litt.* 232 b, n. 1. *Tyson v. Jackson*, 30 Beav. 384. *Hare v. London, & N. W. Ry. Co.*, Johns. 722.

(*q*) *Harrington v. Long*, 2 Myl. & K. 590. *Jones v. Thomas*, 2 Y. & C. 498.

¹ See *post*, note 1, p. 391, and *ante*, note 1, p. 386.

void. (r) But if the interference does not amount to maintenance, there is no champerty, although the party tendering the assistance is to receive the money recovered in the action. (s) An agreement by a solicitor not to charge his client's costs, in consideration of his being allowed to retain for his own use a share of the sums recovered by him for them, amounts to champerty, and is illegal and void; (t) but, if the work is done and the client receives the benefit of it, the solicitor will be entitled to his costs as between solicitor and client. (u) An agreement (to be carried into effect in this country) which, if made in this country, would be void on the ground of champerty, is not the less void because made in a foreign country where such a contract would be legal. (x) The purchase of an estate for the purpose of setting aside a previous agreement affecting the property on the ground of fraud partakes of the nature of champerty, and will not be enforced. (y)

The statutes against champerty were directed mainly against speculations in law suits, and were intended to repress the gambling propensity, which formerly prevailed, of buying up doubtful titles. It was never intended to prevent persons from charging the subject-matter of the suit, in order to obtain the means of prosecuting it. (z)¹

(r) *Stanly v. Jones*, 5 M. & P. 207; N. S. 566; 30 L. J., C. P. 217. 32
7 Bing, 369. *Reynell v. Sprye*, 21 L. Hen. 8, c. 9.
J., Ch. 633. *Sprye v. Porter*, 7 Ell. (u) *Grell v. Levy*, 16 C. B., N. S.
& Bl. 80; 26 L. J., Q. B. 64. 73.

(s) *Williams v. Protheroe*, 3 Y. & J.,
129; 2 M. & P. 779.

(t) *In re Masters*, 4 D. & W. P. C. 21.
Ex parte *Yeaman*, Id. 304. *Hilton*
v. Woods, L. R., 4 Eq. 432; 36 L. J.,
Ch. 941. *Pince v. Beattie*, 32 Id.
734. *Earle v. Hopwood*, 9 C. B.,

(x) Id.

(y) *De Hoghton v. Money*, L. R. 2
Ch. 164. *Hill v. Boyle*, L. R., 4 Eq.
260.

(z) *Anderson v. Radcliffe*, Ell. Bl. &
Ell. 817; 28 L. J., Q. B. 32. *Scott v.*
Miller, 28 L. J., Ch. 584.

¹ As to contracts champertous in the United States, see

258. *Contracts obstructing or interfering with the administration of public justice* are also null and void, as being contrary to the public policy of the law. All contracts prohibiting parties from bringing an action, and all agreements purporting to oust the courts of their jurisdiction altogether, are void. (a) But an agreement to refer existing or future differences to arbitration may be enforced, (b) and agreements for determining only the amount to be recovered by arbitration are valid; (c) and the determination, by arbitration, of the amount of damages to be recovered, or the time of payment, may lawfully be made a condition precedent to the right to maintain an action. (d) All agreements to pay money to induce

(a) *Horton v. Sayer*, 4 H. & N. 643; 29 L. J., Ex. 28. *Lee v. Page*, 30 L. J., Ch. 857.

(b) 17 & 18 Vict. c. 125, s. 11. *Roper v. Lindon*, 1 Ell. & Ell. 825; 28 L. J. Q. B. 262.

(c) *Horton v. Sayer*, *supra*. *Lee v. Page*, 30 L. J., Ch. 857.

(d) *Avery v. Scott*, 8 Exch. 497; 5 H. L. Cas 843. *Brown v. Overbury*, 11 Exch. 715. *Scott v. Corp. of Liverpool*, 28 L. J., Ch. 230. *Tredwen v. Holman*, 1 H. & C. 72; 31 L. J., Ex. 398. *Braunstein v. Accidental Death Insurance Co.*, 1 B. & S. 782; 31 L. J., Q. B. 17.

Stanley v. Jones, 7 Bing. 369; *Thurston v. Percival*, 1 Pick. 415; *Lathrop v. Amherst Bank*, 9 Metc. 489, an excellent case on this subject; *Byrd v. Odem*, 9 Ala. 755; *Satterlee v. Frazer*, 2 Sandf. 141; *Holloway v. Lowe*, 7 Porter, 488; *Key v. Vattier*, 1 Ham. 58; *Rust v. Larue*, 4 Litt. 417; *Evans v. Bell*, 6 Dana, 479; *Wilhite v. Roberts*, 4 Id. 172; *Mahoney v. Bergin*, 41 Cal. 423; *The English Statutes*, 32 Hen. viii., c. 9, which forbade the purchase of a doubtful title by a stranger by one not in possession, was re-enacted in many of the states and in others adopted by practice (*Parsons on C. ii. 767*), and see *Brinley v. Whiting*, 5 Pick. 353; *Whitaker v. Cone*, 2 Johns. Cas. 58; *Belding v. Pitkin*, 2 Caines, 147; *McGoon v. Ankeny*, 11 Ill. 558. But see *Cresinger v. Lessee of Welsh*, 15 Ohio, 156; *Edwards v. Parkhurst*, 21 Vt. 472; *Dunbar v. McFall*, 9 Humph. 505; *Sessions v. Reynolds*, 7 Smedes & M. 132; *Frizzle v. Veach*, 1 Dana, 211; *Stoever v. Whitman*, 6 Binn. 416; *Hadduck v. Wilmarth*, 5 N. H. 181. As to maintenance, see *Call v. Calef*, 13 Metc. 362; *Perine v. Dunn*, 3 Johns. Ch. 508; *Thalheimer v. Brinckerhoff*, 3 Cow. 617.

a party to stifle or suppress evidence, or to give evidence in favor of one side only, or not to appear as a witness in a civil suit or a criminal prosecution, are null and void, *(e)*¹ and will be set aside; *(f)* and so are all agreements to compound a felony, or to forego a prosecution for a public misdemeanor, *(g)* or to hush up a charge of embezzlement, *(h)* or to compromise a suit for divorce in consideration of money to be paid to the petitioner by the co-respondent, *(i)* or to pay money in consideration that a party will use his private interest and influence with the crown to obtain the pardon of a criminal, *(j)* or to pay money in consideration of the abandonment of a petition presented to the house of commons against the return of a member on the ground of bribery; *(k)* and all agreements interfering with the execution and proper administration of the bankrupt laws, and the examination and discharge of bankrupts, or tending to deceive the trustees or officers of the court, or to induce them not to do their duty. *(l)* And not only is the agreement itself void, but any bill of exchange, promissory note, or other security given in pursuance of any such agreement, is tainted with illegality and cannot be enforced, unless it is a negotiable security in the hands of a bona fide holder for value, without notice of the illegality. *(m)* But an agreement to compound civil rights, or to forego or settle an action that has been

- (e)* Collins v. Blantern, 2 Wils. 347. *(j)* Norman v. Cole, 3 Esp. 253.
(f) Williams v. Bayley, L. R. 1 H. *(k)* Coppock v. Bower, 4 M. & W. 367.
 L. 200; 35 L. J., Ch. 717. *(l)* Nerot v. Wallace, 3 T. R. 23.
(g) Keir v. Leeman, 6 Q. B. 308. *(m)* Coles v. Strick, 15 Q. B. 9. Hum-
 Edgcombe v. Rodd, 5 East, 294. phreys v. Welling, 31 L. J., Ex. 33; 1
(h) Ex parte Critchley, 15 L. J., Q. H. & C. 7.
 B. 124. Williams v. Bayley, L. R. 1 *(m)* Clubb v. Hutson, 18 C. B., N.
 H. L. 200; 35 L. J., Ch. 717. S. 414. Williams v. Bayley, L. R. 1
(i) Gipps v. Hume, 31 L. J., Ch. 37. H. L. 200; 35 L. J., Ch. 717.

¹ Valentine v. Sewart, 15 Cal. 387; referring to Bartlett v. Coleman, 4 Pet. 184; Abbe v. Marr, 14 Cal. 210.

commenced, (*n*) or to discharge a party from imprisonment under civil process, or his goods from a distress or execution, (*o*) is valid, and may be enforced. All contracts, bonds, indemnities, guarantees, and undertakings, tending to induce sheriffs, jailers, town-clerks, and public officers, to violate or neglect their duty, or made to protect them from the consequences of their misconduct, are absolutely null and void. (*p*) But an engagement or undertaking to indemnify a sheriff in the execution of a lawful act, or in the exercise of the duties of his office, is valid, and may be enforced—such as an indemnity bond to induce him to execute or not to execute a *fi. fa.* upon goods and chattels, the ownership of which is disputed. (*q*)

259. *Contracts in contravention of the policy of an act of parliament, (r) or of the bankrupt acts,* are illegal and void, such as contracts and securities for the payment of money to a particular creditor to induce him to withdraw his opposition to a bankrupt's discharge, (*s*) or to sign a bankrupt's certificate, or not to take steps to oppose such certificate, (*t*) or to abandon proceedings in bankruptcy, (*u*) or to secure to a particular creditor a superior claim or preference in respect of the future property of the bankrupt, (*x*) or a greater share of the dividends of a bank-

(*n*) *Harding v. Cooper*, 1 Stark. 467.

(*o*) *Drage v. Ibberson*, 2 Esp. 643.

(*p*) *Brett v. Close*, 16 East, 300.

Sugars v. Brinkworth, 4 Campb. 46.

Pilkington v. Green, 2 B. & P. 151.

(*q*) *Blithman v. Martin*, 2 Bulstr. 213.

Wright v. Lord Verney, 3 Doug. 240.

Morris v. Chapman, T. Jones, 24.

Hughes v. Statham, 4 B. & C. 187; 6 D. & R. 219.

(*r*) *Atkinson on Sheriffs*.

(*s*) *Macgregor v. S. E. R. Co.*, 18 Q. B. 618; 22 L. J., Q. B. 69.

(*t*) *Jackson v. Davison*, 4 B. & Ald. 695.

Rogers v. Kingston, 10 Moore, 102; 2 Bing. 441.

Murray v. Reeves, 8 B. & C. 425.

Hall v. Dyson, 16 Jur. 270; 21 L. J., Q. B. 224.

Hills v. Mitson, 8 Exch. 758.

(*u*) *Birch v. Jervis*, 3 C. & P. 379.

(*x*) *Davis v. Holding*, 1 M. & W. 164.

(*y*) *Alsager v. Spalding*, 4 Bing. N. C. 407; 6 Sc. 204.

Rose v. Main, 1 Sc. 127; 1 Bing. N. C. 357.

(*s*) *Jackson v. Davison*, 4 B. & Ald. 695.

Rogers v. Kingston, 10 Moore, 102; 2 Bing. 441.

Murray v. Reeves, 8 B. & C. 425.

Hall v. Dyson, 16 Jur. 270; 21 L. J., Q. B. 224.

Hills v. Mitson, 8 Exch. 758.

(*t*) *Birch v. Jervis*, 3 C. & P. 379.

(*u*) *Davis v. Holding*, 1 M. & W. 164.

(*x*) *Alsager v. Spalding*, 4 Bing. N. C. 407; 6 Sc. 204.

Rose v. Main, 1 Sc. 127; 1 Bing. N. C. 357.

(*y*) *Alsager v. Spalding*, 4 Bing. N. C. 407; 6 Sc. 204.

Rose v. Main, 1 Sc. 127; 1 Bing. N. C. 357.

(*z*) *Alsager v. Spalding*, 4 Bing. N. C. 407; 6 Sc. 204.

Rose v. Main, 1 Sc. 127; 1 Bing. N. C. 357.

(*aa*) *Alsager v. Spalding*, 4 Bing. N. C. 407; 6 Sc. 204.

Rose v. Main, 1 Sc. 127; 1 Bing. N. C. 357.

(*ab*) *Alsager v. Spalding*, 4 Bing. N. C. 407; 6 Sc. 204.

Rose v. Main, 1 Sc. 127; 1 Bing. N. C. 357.

(*ac*) *Alsager v. Spalding*, 4 Bing. N. C. 407; 6 Sc. 204.

Rose v. Main, 1 Sc. 127; 1 Bing. N. C. 357.

(*ad*) *Alsager v. Spalding*, 4 Bing. N. C. 407; 6 Sc. 204.

Rose v. Main, 1 Sc. 127; 1 Bing. N. C. 357.

rupt's estate, (*y*) or to omit a debt from a bankrupt's schedule in order that the creditor may, after the bankruptcy, claim the amount from the bankrupt; (*z*) and so also are all agreements tending to induce the officers of the court or trustees not to do their duty.

(*a*) A covenant or agreement to pay all the creditors their debts in full, in consideration that they will not proceed further under the bankruptcy, is of course perfectly legal; and so is a guarantee to a petitioning creditor, securing to him a dividend of a certain amount on his debt, as an inducement to him to incur the expense and trouble of suing for an adjudication. But if the bankruptcy is a concerted bankruptcy, and there is anything fraudulent or underhand in the proceeding, the contract will be illegal and void. (*b*) By the 32 & 33 Vict. c. 71, s. 92, every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered, by any person unable to pay his debts as they become due from his own moneys, in favor of any creditor or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, is (if the person making, taking, paying, or suffering the same, become bankrupt within three months after the date of making, taking, paying or suffering the same) to be deemed fraudulent and void as against the trustee of the bankrupt under that Act; but the section is not to affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable con-

(*y*) *Staines v. Wainwright*, 6 Bing. N. C. 179; 8 Sc. 280.

(*z*) If the creditor is a party to the omission of the debt, he cannot afterwards recover the amount. *Tabram v.*

Freeman, 4 B. & Ad. 887; 2 C. & M. 451.

(*a*) *Nerot v. Wallace*, 3 T. R. 26. *M'Neill v. Cahill*, 3 Bligh, 229.

(*b*) *Kaze v. Bolton*, 6 T. R. 134. *Fry v. Malcolm*, 5 Taunt. 117.

sideration. A bill of exchange given as an inducement not to oppose the last examination was held not to be within the 12 & 13 Vict. c. 106, s. 202. (c) An agreement by a shareholder in a company which is being compulsorily wound up, that he will endeavor to postpone the making of a call, or will support the claim of a creditor, is illegal, as being contrary to the policy of the Winding-up Acts. (d)

260. *Contracts for the evasion of the registry, licensing and excise Acts* are null and void. An agreement that articles of apprenticeship shall be antedated, to make it appear that an apprentice has been articulated for the full term required by the statute, is null and void; and so is a bond given to secure payment of the premium in respect of such apprenticeship. (e) Where three persons agreed to purchase a ship, to have it registered in the name of two of them only, and to divide the profits and earnings of the ship between the three, it was held that the contract could not be enforced, as it was in direct contravention of the registry Acts. (f) Leases of premises to be used in contravention of the excise laws or licensing Acts, or the provisions of a building Act, or a health of towns Act, or any local, public act of parliament, (g) are illegal and void, if the lessors knew that the premises were to be used for the forbidden purpose. Whenever a license is required for the exercise of a trade, on grounds of public policy, any agreement made with the view of enabling a party to trade without the license is null and void. (h)

(c) *Taylor v. Wilson*, 5 Exch. 251; 19 L. J., Ex. 241.

(d) *Elliott v. Richardson*, L. R., 5 C. P. 744; 39 L. J., C. P. 140.

(e) *Prole v. Wiggins*, 3 Sc. 607; 3 Bing. N. C. 230.

(f) *Battersby v. Smyth*, 3 Mad 110.

(g) *Gas-light and Coke Co. v. Turner*, 5 Bing. N. C. 666.

(h) *Ritchie v. Smith*, 6 C. B. 474; 18 L. J., C. P. 9.

261. *Parish indemnities.*—A security given to overseers to indemnify the parish against charges to which it may be subject by the birth of an illegitimate child therein is not illegal; (*i*) nor is a covenant with a lessor of premises in a parish to indemnify the churchwardens and overseers of the poor of the parish, and the inhabitants thereof, from all charges resulting from the covenantors taking apprentices or servants who should thereby gain a settlement within, or become chargeable to, the parish. (*k*)

262. *Sale of letters of recommendation and public offices of trust.*—All contracts and agreements to pay money to ministers of state for an appointment to a public office of trust, or for the grant of favors from the crown, (*l*) or for an appointment in the dockyard, the crown being kept in ignorance of the bargain, are absolutely null and void, as being contrary to public policy. But if the office is an acknowledged saleable office, and the transaction is carried on under public authority, and with the knowledge and consent of the crown, and of the parties who have the office in their gift, as was formerly the case with sales of commissions in the army, the transaction is lawful, and the contract growing out of it may be enforced. The fellow of a college may assign and mortgage the income and profits of his fellowship, although the assignment may be a violation of his duty to the college; (*m*) and it was also held that the clerk to the deputy registrar in the Prerogative Court of Canterbury might likewise charge or alien the income and profits of his office. (*n*) Exchanges of public offices,

(*i*) *Cole v. Gower*, 6 East, 110.

Bro. C. C. 124. *Morris v. M'Culloch*,

(*k*) *Walsh v. Fussell*, 3 M. & P. 457;

Amb. 435.

6 Bing. 163.

(*m*) *Feistel v. King's Coll.*, 16 L. J.,

(*l*) *Hanington v. Du Chatel*, 1

Ch. 339.

(*n*) *Aston v. Gwinnell*, 3 Y. & J. 196.

and substitutions of one person in the place of another are lawful, when they are made with the knowledge and sanction of the public authorities and the parties who have the regulation and disposal of such offices; but secret and underhand agreements for exchanges of such offices are contrary to public policy, and are consequently void. (o)

263. *Contracts in fraud of masters and employers.*
 —All contracts and agreements to recommend parties for employment in offices of trust in consideration of the payment of money, or to pay money in consideration of such recommendation, entered into without the knowledge of the employer or person who has the office or employment at his disposal, are a fraud upon the latter, and are null and void. (p) If a party entrusted with the duty of selecting fit and proper persons for certain situations and offices obtain contracts or securities for the payment of money by the applicants after their appointment, without the knowledge of the employer or superior, he is guilty of a gross abuse of the confidence reposed in him, and such agreements cannot for a moment stand.¹ But, if the employer is apprised of the whole transaction, it cannot then be considered a fraud on him, although, if the office be a public office, the contract may be void on grounds of public policy (post, p. 201). An agreement to pay money in consideration of a recommendation to the appointment to the command of a vessel, entered into without the knowledge of the ship-

(o) *Parsons v. Thompson*, 1 H. Bl. 522.

(p) *Waldo v. Martin*, 4 B. & C. 319; 6 D. & R. 364.

¹ See *Davison v. Seymour*, 1 Bosw. (N. Y.) 88; *Tatterlee v. Jones*, 3 Duer, 102. And so a contract founded on a promise to obtain signatures to a petition to a governor for the pardon of a criminal, is invalid. *Stoutenburg v. Sebrand*, 13 Ohio St. 228.

owners, is fraudulent and void; (*q*) but, if the ship-owners are cognizant of the agreement at the time they make the appointment, there is then no fraud in the matter. (*r*) If a person is employed to puff a particular tradesman, he cannot bring an action against the latter for his commission, if the employment was kept secret from the customers, and they were led to suppose that the recommendation was founded upon the known character and reputation of the party recommended, and not upon a pecuniary consideration. (*s*)¹

264. *Fraud on creditors.*—If a debtor induces his creditors to compound their claims and execute a deed of composition for their several debts by concealing from them the true state of his affairs, the deed will be void and the creditors remitted to their original rights. (*t*) Whenever creditors enter into a deed of composition with their debtor, whereby they agree to release the latter from his liabilities on payment of a certain rateable proportion of their several claims, any private underhand agreement for securing to any one of the creditors executing the deed any advantage not enjoyed by them all in common is fraudulent and void. If a creditor who becomes a party to such a deed takes from the debtor a promissory note for the residue of his demand, unknown to the other creditors,

(*q*) *Blackford v. Preston*, 8 T. R. 89. *Card v. Hope*, 2 B. & C. 672.

(*r*) *Richardson v. Mellish*, 2 Bing. 242.

(*s*) *Wyburd v. Stanton*, 4 Esp. 179.

(*t*) *Vine v. Mitchell*, 1 Mood. & Rob. 337. *Wenham v. Fowle*, 3 Dowl. P. C. 43.

¹ But in all these contracts the illegality must be affirmatively shown; it will not be presumed in any case (*Craft v. Bent*, 8 Kan. 328). But it has been held that the rule *ex turpi causi, &c.*, cannot be used by a wrong-doer against an innocent party whose rights have been acquired without notice of the wrong-doing. *Quick v. Thomas*, 6 Mich. 67.

(u) or receives a covenant, bond, or any security for the payment of money at some subsequent period as an inducement to him to join in the execution of the deed, the security is absolutely void. (x) And, although a promisory note so given has been dishonored, and an action brought upon it and judgment recovered, yet a guarantee given for the amount of such judgment is tainted with the original fraud, and cannot be enforced, notwithstanding that the illegality might have been, but was not, pleaded to the action. (y) If money is paid to one creditor, unknown to the other creditors, it may be recovered back. (z) And, although he is to receive no more money than the others, yet, if the composition is to be paid by instalments, and he secretly bargains for, and obtains, better security for the payment of his own instalments than is possessed by the other creditors, the security so obtained is void. (a) And if he has secretly received either goods or money, to induce him to compound his claim and join in the execution of the composition deed, he will not be allowed to sue upon the deed for the instalments due to him, or upon any bond or bill of exchange given him to secure the payment of such instalments. (b) A bargain by which a creditor, in consideration of his being a security for the payment to the others of a composition, agreed with the debtor, without the knowledge of the other creditors, for the payment of his own debt in full, was set aside at the

(u) *Cockshott v. Bennett*, 2 T. R. 753.

(x) *Jackson v. Lomas*, 4 T. R. 166. *Wells v. Girling*, 4 Moore, 87; 1 B. & B. 447. *Geere v. Mayre*, 2 H. & C. 339; 33 L. J., Ex. 50. *Daughlish v. Tennent*, 36 L. J., Q. B. 10; L. R. 2 Q. B. 49. *Mare v. Warner*, 3 Giff. 100. *Mare v. Earle*, 3 Giff. 108.

(y) *Clay v. Ray*, 17 C. B., N. S. 188. *Geere v. Mare*, 2 H. & C. 339; 33 L. J. Ex. 50.

(z) *Alsager v. Spalding*, 4 Bing. N. C. 407. *Atkinson v. Denby*, 7 H. & N. 934; 31 L. J., Ex. 362.

(a) *Leicester v. Rose*, 4 East, 381.

(b) *Knight v. Hunt*, 3 M. & P. 181; 5 Birg. 432.

instance of the debtor. (c) If the creditor keeps back a portion of the debts due to him, and does not correctly state the amount of his claim in the composition deed, his conduct is fraudulent, and he will not be allowed to sue the debtor for the debts omitted. (d) If he makes a promise, upon the faith of which the composition proceeds, he will not be permitted to violate his engagement, as his doing so would amount to a fraud upon the other creditors. (e)¹

All the creditors are presumed to compound their claims upon the debtor, on the understanding that they are all to receive equal proportions of their several debts; and they all accept the same security for what they are individually to receive. They are, therefore, not fairly dealt by, if any one of them bargains for, or receives better terms than another. (f) But a creditor who holds bills of exchange drawn by the debtor upon, and accepted by, third parties, as a security for part of his debt, is entitled to avail himself of the benefit of such securities; and if he claims the whole of his debt under the composition deed, in the first instance, and then receives the amount due upon the bills, he is entitled to his composition upon the residue of his demand. (g) The omission to state the amount of the debt in the deed will not avoid the contract as regards the creditor whose debt has been so omitted to be stated; but the amount of the debt may be proved by extrinsic testimony. (h)

265. *Contracts made illegal by statutes.*—Every-

(c) Wood v. Barker, L. R., 1 Eq. 6 D. & R. 567. Coleman v. Waller, 3 139; 35 L. J., Ch. 276. Y. & J. 217.

(d) Britten v. Hughes, 3 M. & P. (g) Thomas v. Courtney, 1 B. & Ald. 5. 77; 5 Bing. 460.

(e) Clark v. Upton, 3 M. & R. 89. (h) Harry v. Wall, 1 B. & Ald.

(f) Lewis v. Jones, 4 B. & C. 511; 103. Reay v. White, 1 C. & M. 742.

¹ Dexter v. Snow, 12 Cush. 507

thing in respect of which a penalty is imposed by statute must be taken to be a thing forbidden; and a contract to do such thing is absolutely void, to all intents and purposes whatsoever. (*i*) Where the contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties knew the law or not; but in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was an intention to break the law; and then it becomes important to ascertain whether the parties knew what the law was. (*k*)¹

266. *Illegal sale of offices.*—By the 5 & 6 Ed. 6, c. 16, ss. 2, 3, and the 49 Geo. 3, c. 126, it is enacted that all contracts for money or profit, relating to appointments touching the administration of justice, or the collection of the revenue, or to any office in the gift of the crown, and any commission, civil, naval, or military, and any place or employment in any public department or office of government, shall be void. But it is provided (s. 7) that the statute shall not extend to any purchase or sale, or agreement for the purchase or sale, of certain specified offices in the palace, or commissions in the army, at the regulated prices. (*l*) All assignments, trusts, and money bar-

(*i*) *Chambers v. Manchester, & Milford Ry. Co.*, 5 B. & S. 588. In re *Cork & Youghal Ry. Co.*, L. R., 4 Ch. 748; 39 L. J., Ch. 277.

(*k*) *Waugh v. Morris*, L. R., 8 Q. B. 202, 208, per Blackburn, J.

(*l*) The sale of commissions is now illegal.

¹ *Belding v. Plikin*, 2 Caines, 149; *Springfield Bank v. Merrick*, 14 Mass. 322; *Russel v. De Grand*, 15 Mass. 39; *Wheeler v. Russell*, 17 Mass. 281; *Utica Ins. Co. v. Scott*, 19 Johns. 1; *Id. v. Bloodgood*, 4 Wend. 652; *Id. v. Kip*, 8 Cowen, 20; *Id. v. Caldwell*, 3 Wend. 296; see 2 *Parsons on Contracts*, 747; *Foot v. Emerson*, 10 Vt. 338; *White v. Franklin Bank*, 22 Pick. 281; *Peck v. Barr*, 10 N. Y. 294.

gains, therefore, respecting cadetships, places, and public offices not within the exception in the statute, are illegal and void. (*m*) The offices of sub-distributor of stamps and collector of taxes are within the statute, both of them being connected with the receipt of the revenue; (*n*) but the office of clerk to the deputy registrar in the prerogative court of Canterbury, was held not to be an office within the act, (*o*) nor the office of clerk to assessed tax commissioners, or of clerk to commissioners of sewers, (*p*) nor the fellowship of a college. (*q*) The appointment of a deputy to fulfill the duties of a public office at a fixed salary, the deputy paying over the fees and emoluments of the office to the principal, is of course perfectly legal, where the business of the office can be lawfully transacted by the deputy; but, if the deputy takes the fees and emoluments of the office, and pays a fixed sum annually to the principal for the post, the deputation of the office and the contract to pay the money are illegal and void. (*r*)¹

267. Sale of pensions.—An assignment by a retired military officer of his pension for valuable consideration is void under the 47 Geo. 3, c. 25. (*s*) But an assignment of a pension granted by the late East

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| (<i>m</i>) Graeme v. Wroughton, 24 L. J., Ex. 265 | (<i>p</i>) Sterry v. Clifton, 9 C. B. 110; 19 L. J., C. P. 237. |
| Lee v. Coleshill, Cro. Eliz. 529. | (<i>q</i>) Feistel v. King's College, 16 L. J., Ch. 339. |
| Stackpole, v. Earle, 2 Wils. 133. | (<i>r</i>) Godolphin v. Tudor, 2 Salk. 468. |
| Garforth v. Fearon, 1 H. Bl. 328. | Gulliford v. De Cardonell, Id. 466; |
| Palmer v. Bate, 2 B. & B. 673. | 1 Bro. P. C. 135. |
| Parker v. Brown, Cro. Jac. 612. | Greville v. Atkins, 9 B. & C. 462; 4 M. & R. 372. |
| Reg. v. Charretie, 18 L. J., M. C. 151; 13 Q. B. 447. | (<i>s</i>) Lloyd v. Cheetham, 3 Giff. 171. |
| (<i>n</i>) Hopkins v. Prescott, 16 L. J., C. P. 259; 4 C. B. 578. | |
| (<i>o</i>) Austin v. Gwinnell, 3 Y. & J. 136. | |

¹ And a contract tending to corrupt appointment to office, even by a private corporation, has been void. Davison v. Seymour, 1 Bosw. 88.

India Company is valid. (t) And so is an assignment of a pension payable to a former officer of the East India Company out of the revenues of India, since the 21 & 22 Vict., c. 106. (u)¹

268. *Simoniacal contracts*.—By the 31 Eliz., c. 6, s. 5, it is enacted that if any person, body politic or corporate, shall, for money, reward, &c., or for any promise or contract for money, &c., present to any benefice with cure of souls, prebend, or any ecclesiastical living or dignity, the presentation, and every admission or investiture thereupon made, shall be utterly void. A penalty is imposed upon the parties to such a transaction, and upon every person who receives money or reward, or accepts a promise thereof, to admit or induct any person into any benefice or ecclesiastical dignity. Penalties are also imposed upon persons who resign or exchange benefices, with cure of souls, for money, reward, or benefit. And, by the 12 Anne, st. 2, c. 12, it is enacted that, if any person, for money, reward, &c., or by reason of any promise of money, &c., directly or indirectly procures or accepts the next avoidance or presentation to any benefice, &c., and shall be presented thereupon, such presentation shall be void, and the agreement shall be deemed to be a simoniacal contract. (x)

The statutes against simony do not interfere with

(t) *Heald v. Hay*, 3 Giff. 467.

(u) *Carew v. Cooper*, 4 Giff. 619.

(*) See the 32 & 33 Vict. c. 94, ss.

12 & 13, as to contracts under the provisions of the Church Building Acts and New Parishes Acts relative to rights of presentation.

¹ So contracts tending to corrupt legislation :—*Ellipinger v. Hepbaugh*, 5 Watts & S. 313; *Wood v. McCann*, 6 Dana, 366; *Hartzfield v. Gulden*, 7 Watts, 152; *Fuller v. Dame*, 18 Pick. 427; *Garlick v. Ward*, 5 Halst. 87; *Harris v. Roof*, 10 Barb. 489; *Brigg v. Washburne*, 1 Aik. 264; *Marshall v. Baltimore, &c. R. R. Co.*, 16 How. 314.

or prohibit the sale of an advowson, or the right of presentation to a living or benefice which is filled at the time of the sale; but the object of them is to restrain a patron who possesses the right of presenting at a vacancy from being influenced in the choice of his presentee by a bribe or benefit to himself. An agreement, however, for the sale of an advowson, containing a stipulation that the vendor should pay interest until the benefice became vacant, the incumbent being a son of the vendor, but not being a party to the contract, was held not to be simoniacal. (y) If an advowson is sold or transferred during a vacancy of the benefice, the presentation upon that vacancy does not pass by the grant. It is a fruit fallen or chose in action vested in the patron, which cannot legally be sold or transferred by him; (z) and, if it is provided in any part of the contract that the right of presentation which has then accrued shall be exercised by the late patron in favor of a nominee of the purchaser or of any particular individual, the whole contract is simoniacal and void. If the incumbent of a living is sick and dying, and the next presentation is purchased with intent to present a particular person as soon as the expected vacancy occurs, the purchase is simoniacal and void. But not if it is made without the privity of, and without a view to the nomination of, the clerk afterwards appointed. (a)

269. Resigning and charging benefices.—A bond given by an incumbent for the resignation of his benefice, on notice or request generally, or in favor of a particular person named in the bond, as soon as the latter should become qualified for admission or induc-

(y) *Sweet v. Meredith*, 3 Giff. 610;
32 L. J., Ch. 147.

(a) *Sheldon v. Brett*, Winch. 63.
Fox v. Bishop of Chester, 6 Bing. 1;

(z) *Leak v. Babington*, Cro. Eliz. 1 Dow. & C. 416.
811.

tion to such benefice, has been held void, as "coming as near simony as possible." (*b*) Two acts of parliament, however, have been passed (7 & 8 Geo. 4, c. 25, and 9 Geo. 4, c. 94), legalizing bonds of this description. By the 13 Eliz. c. 20 (revived by 57 Geo. 3, c. 99), it is enacted that all charging of benefices with any pension or profit to be taken out of the same, other than rents to be reserved upon leases as therein mentioned, shall be utterly void. Under this statute it has been held that a demise of the glebe by the incumbent of a benefice, to secure an annuity, is void; (*c*) also an agreement by a clergyman to appropriate the future profits of his living to the payment of his debts, reserving thereout a competent stipend to a curate to serve the church; (*d*) also a warrant of attorney which appears on the face of it to be an authority for the sequestration of a living and the appropriation of the profits in discharge of a debt due from the incumbent. (*e*) But a warrant of attorney to enter up judgment against the incumbent, given with a defeasance in the usual form, and not charging the benefice in express terms, is not void, (*f*) although it may refer on the face of it to a void deed charging the benefice, and may appear to be given as a collateral security for the same debt. (*g*)

270. *Contracts in general restraint of industry and trade*, preventing parties from gaining a livelihood in any particular vocation or profession, are absolutely null and void, as being contrary to public

(*b*) *Fletcher v. Ld. Sondes*, 3 Bing. Hewett, 3 N. & M. 656; 1 Ad. & E. 501. 812.

(*c*) *Shaw v. Pritchard*, 5 M. & R. 180; 10 B. & C. 241.

(*d*) *Alchin v. Hopkins*, 4 M. & Sc. 615; 1 Bing. N. C. 99.

(*e*) *Newland v. Watkin*, 2 M. & Sc. 174; 9 Bing. 113. *Saltmarsh v.*

(*f*) *Moore v. Ramsden*, 7 Ad. & E. 907; 3 N. & P. 180.

(*g*) *Colebrook v. Layton*, 4 B. & Ad. 578; 1 N. & M. 374. *Bendry v. Price*, 6 Dowl. P. C. 753. *Bishop v. Hatch*, Id. 763.

policy. (*h*) In the reign of Henry V., a plaintiff brought an action against a dyer upon a bond whereby the latter bound himself not to use or exercise his craft or trade of dying, and Hull, J., as soon as he heard the bond read, declared that it was contrary to the common law, and swore on the bench that, if the plaintiff had been present in court, he would have sent him to prison until he had paid a fine to the king. (*i*) "I might as well bind myself," observes Anderson, J., "not to go to church." (*k*) If the restraint is general, and not confined to any particular district or locality, the shortness of time for which it is imposed will not make it good. Therefore, where a coal merchant's clerk and traveler bound himself "not to follow or be employed in the business of a coal merchant for the space of nine months after he should have left the service of his employer, it was held that the bond was void." (*l*) Contracts also whereby certain master manufacturers mutually bind themselves to close their works at the will of a majority are contracts in restraint of trade, and therefore null and void. (*m*)

271. *Trade Unions*.—By the 34 & 35 Vict. c. 31, s. 3, the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust. But by sect. 4, nothing in that act is to enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of—1st, any agreement between members of a trade union as such.

(*h*) *Thompson v. Harvey*, Show. 2; Com. Dig. Trade, 3. *Gunmakers' Co. v. Fell*, Willes, 389. *Tailors of Litchfield's case*, 11 Co. 53 a. *Hinde v. Gray*, 1 M. & Gr. 195; 1 Sc. N. R. 123.

(*i*) 2 Hen. 5, fol. 5, pl. 26.

(*k*) *Claygate v. Batchelor*, Owen 143.

(*l*) *Ward v. Byrne*, 5 M. & W. 548.

(*m*) *Hilton v. Eckersley*, 6 Ell. & Bl. 47; 24 L. J., Q. B. 353.

concerning the conditions on which any members for the time being, of such trade union shall or shall not sell their goods, transact business, employ or be employed; 2nd, any agreement for the payment by any person, of any subscription or penalty to a trade union; 3rd, any agreement for the application of the funds of a trade union, to provide benefits to members, or to furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules and resolutions of such trade union, or to discharge any fine imposed upon any person by sentence of a court of justice; 4th, any agreement made between one trade union and another; 5th, any bond to secure the performance of any of the above-mentioned agreements. But nothing in that section is to be deemed to constitute any of the above-mentioned agreements unlawful.

272. Contracts restraining the exercise of a trade or profession in particular localities are good and valid, when there is a fair and reasonable ground for the restriction, as in the case of the sale of the good-will of a trade or business carried on in a particular locality, where the vendor covenants or agrees not to carry on the same business on the same spot in opposition to the purchaser; (*n*)¹ or the taking of an ap-

(*n*) *Prugnell v. Gosse*, Aleyn, 67. *Smith's L. C.* 340, 5th ed. *Archer v. Broad v. Jollyffe*, Cro. Jac. 596. *Jollie Marsh*, 6 Ad. & E. 959. *Jones v. & Broad's Case*, 2 Rolle R. 201. *Mitchell v. Reynolds*, 1 P. Wms. 181; 1

¹ "Equity will decree specific performance of a bargain for the sale of a good-will of a trade, provided it be connected with any specific stock in trade, or with some valuable secret of trade, or with a well-established stand for business, but not—it is said—a naked bargain for good-will, because equity could not direct the way in which the defendant should pro

prentice or servant, clerk or traveler, upon the terms that he shall not, during or after the termination of his engagement, solicit custom from the master's customers, (o) or set up the same trade, craft, or profession in opposition to his employer in his immediate neighborhood, or in the district over which the master's business extends; (p) or the formation or dissolution of a partnership, or the retirement of one of the members of a firm, upon the terms, and subject to an agreement, that he will not at any time be a competitor with the remaining partners, or any new partners or assignees, in the district where the business is carried on. (q) Where the contract is reasonable, the courts will prevent any infringement of it, although a pecuniary penalty in the case of a breach may have been stipulated for in the agreement. (r) A trader "may sell a secret of business, and restrain himself generally from using that secret;" (s) and railway companies and other parties engaged in trade may lawfully agree that one company shall not compete or interfere with the other upon a particular line of railway. (t) But the restraint must be confined within reasonable limits; for, where it is larger and wider

(o) *Rannie v. Irvine*, 8 Sc. N. R. 674; 7 M. & Gr. 969. *Hunlocke v. Blacklowe*, 8 Wms. Saund. 156. *Homer v. Ashford*, 11 Moore, 101. *Hartley Cummings*, 17 L. J., C. P. 84; 5 C. B. 247.

(p) *Chesman v. Nainby*, 2 Ld. Raym. 1456; 2 Str. 739. *Nicholls v. Stretton*, 7 Beav. 42. *Sainter v. Ferguson*, 7 C. B. 716; 18 L. J., C. P. 217. *Dendy v. Henderson*, 11 Exch. 194. *Benwell v. Inns*, 26 L. J., Ch. 663.

(q) *Gale v. Reed*, 8 East, 80. *Leighton v. Wales*, 3 M. & W. 545.

(r) *Fox v. Scard*, 33 Beav. 327. *Howard v. Woodward*, 34 L. J., Ch. 47. But see *Carnes v. Nisbett*, 7 H. & N. 778; 31 L. J., Ex. 273.

(s) *V. C. Leach, Byson v. Whitehead*, 1 Sim. & Stu. 77. *Leather Cloth Co. v. Lonsout*, L. R., 9 Eq. 345; 39 L. J., Ch. 86.

(t) *Shrews. & Birm. Ry. Co. v. Lond. & N. W. Ry. Co.* 21 L. J., Q. B. 89.

ceed to turn the custom of those who had dealt with him, to the plaintiff." 3 Parsons on Contracts, 368.

than is necessary for the protection of the party with whom the contract is made, it is illegal, and the contract is void. (*u*) It has been held that the limit of a provincial town, and ten or twenty miles round it, is not too large for such a profession as a surgeon, apothecary and man-midwife; (*x*) five miles from Northampton Square, in the county of Middlesex, in the case of a milkman and cowkeeper; (*y*) one mile in the case of a fruiterer; (*z*) and that the wide ambit of the metropolis is not too large for such a profession as that of a dentist; nor even "London and 150 miles from thence," for the profession of a solicitor, (*a*) or a canvassing publisher; (*b*) nor Birmingham and 200 miles from thence, in the case of a horse-hair manufacturer. (*c*) But a restraint, extending over so large a district, seems to be at variance with the ancient policy of the common law in respect of "restraint of trade," and to overrule some earlier decisions holding that a restraint extending over so wide an area is void, on the ground that the employer shuts out the assistant from a larger field of exertion than can by possibility be beneficially occupied by himself. (*d*) "Six hundred miles from any particular spot in this kingdom is out of all reason, and absolutely void." (*e*) In one case it has been held that the reasonableness of the restriction, and its consequent validity, depend upon the extent, and not the populousness of the district. In another, that both the superficial

(*u*) *Hitchcock v. Coker*, 6 Ad. & E. 454.

(*x*) *Davis v. Mason*, 5 T. R. 118. *Atkins v. Kinnier*, 4 Exch. 776; 19 L. J., Ex. 134. *Carnes v. Nisbett*, *ante*, p. 7; H. & N. 778; 31 L. J., Ex. 273.

(*y*) *Proctor v. Sargent*, 2 M. & Gr. 20; 2 Sc. 289.

(*z*) *Pemberton v. Vaughan*, 16 L. J., Q. B. 161.

(*a*) *Bunn v. Guy*, 4 East, 190.

(*b*) *Tallis v. Tallis*, 22 L. J., Q. B. 185. *Horner v. Graves*, 7 Bing. 735.

(*c*) *Harms v. Parsons*, 32 Beav. 328; 32 L. J., Ch. 217.

(*d*) *Mallan v. May*, 11 M. & W. 668.

(*e*) *Price v. Green*, 16 M. & W. 346; 10 L. J., Ex. 108.

area and the amount of the population are to be taken into consideration.¹

When the restraint is limited in point of space, the limit is to be measured by a straight line drawn upon the horizontal plane from point to point. (f) If the restraint is reasonable as to space, the circumstance that it is indefinite in point of time will not affect its validity. (g) The cause or consideration for the restraint must be disclosed upon the face of the contract, as the courts will not, it seems, permit the reason or ground for it, however partial or slight the restraint may be, to be supplied by evidence outside the contract. If the restraint merely appears without

(f) *Lake v. Butler*, 24 L. J., Q. B. 70; *Id.* 8, Ex. 32; 41 L. J., Ex. 28; 273. *Duignan v. Walker*, 28 L. J., 42 L. J., Ex. 8.
Ch. 867. *Mouflet v. Cole*, L. R. 7 Ex. (g) *Catt v. Tourle*, L. R. 4 Ch. 654; 38 L. J., Ch. 665.

¹ Where defendant sold a grocery store to plaintiff, verbally agreeing not to carry on the grocery business within a certain limited distance in the city of Boston, held, it was a sufficient consideration for such an agreement, if the plaintiff were thereby induced to purchase the grocery, and that this might be shown by parol (*Pierce v. Woodward*, 6 Pick. 206). And so where the agreement was stipulated not to be carried on within twenty miles of a certain spot, the agreement was held binding (*Nobles v. Bates*, 7 Cow. 307). So an agreement not to run a stage coach between certain points (*Pierce v. Fuller*, 8 Mass. 223). And to give to the plaintiff all the freighting of the defendant's goods and not to encourage other carriers to competition, have been held not to be illegal as in restraint of trade. *Palmer v. Stebbins*, 3 Pick. 188; see also, *Grasselli v. Lowden*, 11 Ohio St. 349; *Bowser v. Blits*, 7 Blackf. 344; *Perkins v. Lyman*, 9 Mass. 522; *Pyke v. Thomas*, 4 Bibb. 486; *Stearns v. Barrett*, 1 Pick. 443; *Alger v. Thatcher* 19 Pick. 51; *Vickery v. Welch*, *Id.* 523; *Chappel v. Bronson* 21 Wend. 157; *Ross v. Sudgbeer*, *Id.* 166; *Jarvis v. Peck*, 1 Hoff. Ch. 479; and see *Thomas v. Miles*, 3 Ohio St. 274; *Dunlop v. Gregory*, 10 N. Y. 241; *Kinsman v. Parkhurst*, 18 How. 289; *Lawrence v. Kidder*, 10 Barb. 641; *Mott v. Mott*, 11 Barb. 127; *Van Harter v. Babcock*, 25 Barb. 633; *Beard v. Dennis*, 6 Ind. 200.

anything to show it to be reasonable and proper, the contract is invalid, whether it be under seal or whether it be a simple contract only. The court, and not the jury, are to judge of the circumstances and the reasonableness of the restraint, and determine whether the contract is valid or not. (*h*)

If one man binds himself to serve another for a particular period, and not to carry on or exercise the business of his employers within ten miles of their place of business, the restriction will be confined to the period of service, (*i*) unless the entire services of the servant are, by the contract, to be devoted to the employer, and the restriction is manifestly intended to come into operation when he leaves the service, and is his own master. (*k*) A person who has covenanted not to trade within certain reasonable limits, is bound by his covenant, although the covenantee may have ceased, both by himself and by his agents, licensees, or assigns, to carry on the trade. (*l*) He is responsible if he serves customers within the prohibited limits, although he has no residence, shop, or place of business within them. (*m*) There is not any implied covenant or promise, on the part of a vendor or assignor of the good-will of a business, not to set up the same trade in opposition to the purchaser, in the neighborhood of the spot where the business is carried on; and the courts will not grant an injunction to prevent the vendor from so doing. (*n*) But they will interfere to prevent his soliciting the customers of the old business to cease dealing with the purchaser, or to

(*h*) *Homer v. Ashford*, 11 Moore, 103. *Hutton v. Parker*, 7 Dowl. P. C. 739. *Mallan v. May*, 11 M. & W. 665.

(*i*) *King v. Hansell*, 5 H. & N. 106.

(*k*) *Mumford v. Gething*, 29 L. J., C. P. 105; 7 C. B., N. S. 305.

(*l*) *Elves v. Crofts*, 10 C. B. 241; 19 L. J., C. P. 389.

(*m*) *Turner v. Evans*, 2 El. & Bl. 512; 22 L. J., Q. B. 412. *Brampton v. Beddoes*, 13 C. B., N. S. 538.

(*n*) *Cruttwell v. Lye*, 17 Ves. 346.

give their custom to himself; (*o*) and when the business of a firm has been carried on under an adopted name, a person who sells the good-will of the business cannot set up the same business under the same name and style, although he cannot be prevented from using his own name. (*p*) An agreement between several persons carrying on a particular trade, in various parts of England, not to interfere with each other in different towns and districts, or become competitors, or undersell one another, in particular localities, is not contrary to public policy, and is, consequently, valid. (*q*) And lastly, it must be observed, that the exercise of the trade or profession in the prohibited district must be shown to have been made in opposition to, and against the will of, the covenantee. If it is done at his request, to aid and assist him, there is not any breach of the covenant. (*r*)

273. *Contracts creating monopolies*, also, are null and void, as being contrary to public policy, (*s*) "which favors free trade, and is against monopoly and ingrossing." (*t*) Contracts between brewers and publicans, restraining the publican from buying beer from any other brewer than the one named in the contract, may be thought to be contrary to the common law, as creating a monopoly; but, although these contracts have been censured and disapproved of, they have never been held to be invalid. Before, however, the brewer can recover damages for a breach of the contract by the publican, he must show clearly and satisfactorily that the beer supplied by him was good, marketable beer—wholesome, and fit to drink—and

(*o*) *Labouchere v. Dawson*, L. R. 13 Eq. 322; 41 L. J., Ch. 427.

(*p*) *Churton v. Douglas*, 28 L. J., Ch. 841; *Johns*, 174.

(*q*) *Wickens v. Evans*, 3 Y. & J. 330.

(*r*) *Rawlinson v. Clarke*, 14 M. & W. 191.

(*s*) 3 Inst. 181. 21 Jac. 1, c. 3.

(*t*) *East Ind. Co. v. Standys, Skin.*

169. *Darcy v. Allen, Moore*, 671.

that the price was reasonable. (*u*) A grant, from the crown, of the sole use, for a reasonable period, of any art invented or first brought into the realm by the grantee, is not void as being contrary to the policy of the common law. (*x*)¹

274. *Contracts with foreign enemies.*—All contracts for commercial and trading purposes, made between British subjects and the subjects of a sovereign who is at war with this country, are null and void, and cannot be enforced in our courts of law on the return of peace, (*y*) unless the contracts have been made pursuant to a license to trade granted by the crown. (*z*) The effect of a license, authorizing an alien enemy to trade with this country, is to legalize the commerce comprehended in the license, and all usual and requisite contracts entered into for carrying on such licensed trade. The alien licensee, consequently, may sue and be sued in respect of such contracts, just the same as if he were a natural-born subject. (*a*) A contract between two subjects of a neutral state, to export contraband of war to a belligerent, is lawful, and may be enforced in the courts of the neutral state. (*b*)²

The case of Monopolies, 11 Co. 86
b. Com. Dig. TRADE, D. 4.

(*u*) Holcombe v. Hewson, 2 Campb.
391. Jones v. Edney, 3 Id. 285. Thorn-
ton v. Sherratt, 8 Taunt. 530.

(*x*) The case of Monopolies, 11 Co.
86, b. Com. Dig. TRADE, D. 4. 21
Jac. 1, c. 3, s. 6. Duvergier v. Fel-
lows, 10 B. & C. 829.

(*y*) Potts v. Bell, 8 T. R. 548. Og-
den v. Peele, 8 D. & R. 1. Bell v.

Reid, 1 M. & S. 731. Furtado v.
Rodgers, 3 B. & P. 20.

(*z*) Flindt v. Scott, 15 East, 525; 5
Taunt. 674. Vaughan v. Lemcke, 7
D. & R. 236; 8 Moore, 646.

(*a*) Usparicha v. Noble, 13 East,
340. Fenton v. Pearson, 15 Id.
426. Morgan v. Oswald, 3 Taunt. 568.

(*b*) Ex parte Chavasse, in re Graze-
brook, 34 L. J., Bk. 17. The Helen,
35 L. J., Adm. 2; L. R., 1 Adm. 1.

¹ Alger v. Thatcher, 19 Pick. 51; and so a copyright to an author securing him in his literary property in his composition is not a monopoly. Morgan on the Law of Literature, vol ii pp. 2, 3.

² Bonds issued by authority of the convention of Arkan-

275. *Stock-jobbing.*—The 7 Geo. 2, c. 8, and the 10 Geo. 2, c. 8, passed to prevent the practice of stock-jobbing have been repealed by the 23 Vict. c. 28, on the ground that they impose unnecessary restrictions on the making of contracts for the sale and transfer of public stocks and securities.¹

276. *Gaming contracts and wagers.*—By the 8 & 9 Vict. c. 109, s. 18, it is enacted that all contracts or agreements by way of gaming or wagering shall be null and void; and that no action or suit shall be brought or maintained for recovering money or any valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made; but it is provided that the prohibition of gaming or wagering contracts therein contained, shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money, to be awarded to the winners of any lawful game, sport, pastime, or exercise. An agreement between two persons, each of whom is possessed of a horse, to ride a race, the winner to have both horses, is an agreement by way of wagering, and not an agreement to contribute towards a prize to be awarded to the winner of a lawful game, and is therefore null and void. (c) A colorable contract for the purchase and sale of railway shares or of goods, where neither party

(c) *Coombes v. Dibble*, L. R., 1 Ex. 248; 35 L. J., Ex. 167; 4 H. & C. 375.

sas for the purpose of raising money to carry on a war against the United States, will not constitute a valid consideration for a promissory note. *Hanauer v. Woodruff*, 15 Wall. 439.

¹ In *Smith v. Bouvier*, 70 Pa. St. 325, there does not appear to be any legislation answering to this here; it was held that where stocks are bought and sold, though upon speculation, if they are to be delivered, it is not a gambling transaction.

intends to deliver or accept the shares or the goods but merely to pay differences according to the rise or fall of the market, is gaming and wagering; and it is for a jury to determine whether the parties really meant to purchase and sell, or whether the transaction was a mere bet upon the future price of the commodity; (d) but there is no ground for contending that a contract for the sale of shares or of goods and chattels, to be delivered at a future day, is a gaming or wagering contract, merely because the vendor neither has the shares or goods in his possession, nor has entered into any contract to buy them, nor has any expectation of becoming possessed of them by the time appointed for transferring or delivering them, otherwise than by purchasing them in the market. (e)¹

Oral evidence may be given, and the parties themselves be examined, to show that a contract, purporting on the face of it to be a contract of sale, was a mere gaming contract, void ab initio, although the contract

(d) *Grizewood v. Blane*, 11 C. B. M. & W. 466; overruling *Bryan v. 538. Rourke v. Short*, 25 L. J., Q. B. Lewis, R. & M. 386. *Phillips, ex parte*, 6 Jur. N. S. 1273; 30 L. J., 196.

(e) *Hibblewhite v. McMorine*, 5 Bk. I.

¹ It has been held in the United States that, by common law, wagers are not per se void, unless affecting the interests, feelings or character of third persons, or tending to immorality, or to breach of the peace, or as against public policy. So a wager as to the sex of a third person (*Phillips v. Ives*, 1 Rawle, 37), just as in England it was held that an unmarried woman would bear a child on a certain day (*Hartley v. Rice*, 10 East. 22), or that a certain person would not marry within a certain number of years (*Gilbert v. Sykes*, 16 East, 150), or a bet that a certain chaise was the property of A. and not of B. *Collamer v. Day*, 2 Vt. 144; *Morgan v. Richards*, 1 Growne (Pa.) 171; *Bunn v. Riker*, 4 Johns. 426; *Hasket v. Wootan*, 1 Nott. & Mc. 180; *Shepherd v. Sawyer*, 2 Murphy, 26; *Barret v. Hampton*, 2 Brev. 220; *Grant v. Hamilton*, 3 McLean, 100; *Ross v. Green*, 4 Harring. 308; *Dunman v. Strother*, 1 Tex. 89.

is in writing or under seal. (*f*) The statute against gaming prevents the winner of a wager from recovering the money won by him from the loser, and also from recovering money deposited in the hands of a stakeholder to abide the event, and to be paid to the winner, (*g*) but it does not prevent the depositor from repudiating the contract, and recovering back his deposit before the event has happened, and the wager has been decided, nor does it prevent a third party from suing for the recovery of money paid at the request of the defendant to the winner of a bet. (*h*)¹

277. Betting-house keepers.—By the 16 & 17 Vict. c. 119, s. 1, betting-houses are prohibited; and it is

(*f*) *Collins v. Blantern*, 1 Smith's Lead. Cas. 310, 5th ed. *Enderby v. Gilpin*, 5 Moore, 588.

(*g*) *Beyer v. Adams*, 26 L. J., Ch. 841.
(*h*) *Jessop v. Lutwyche*, 24 L. J., Ex. 65.

¹ And see *Amory v. Gilman*, 2 Mass. 1; *Carrier v. Brannan*, 3 Cal. 328; *Lewis v. Littlefield*, 15 Me. 233; *Edgell v. McLaughlin*, 6 Whart. 176; *Rice v. Gist*, 1 Strobb. 82; *Hoit v. Hodge*, 6 N. H. 104; *Ball v. Gilbert*, 12 Met. 399; *Babcock v. Thompson*, 13 Pick. 446. Wagers as to the result of an election are void, both at common law, and generally by statute, as against public policy and as tending to impair the purity of elections, see *David v. Ransom*, 1 Greene, 383; *Davis v. Holbrook*, 1 La. An. 176; *Tarlton v. Baker*, 18 Vt. 9; *Commonwealth v. Pash*, 9 Dana, 31; *Machir v. Moore*, 2 Gratt. 257; *Foreman v. Hardwick*, 10 Ala. 316; *Wheeler v. Spencer*, 15 Conn. 28; *Russell v. Pyland*, 2 Humph. 131; *Porter v. Sawyer*, 1 Harring. (Del.) 517; *Gardner v. Nolen*, 3 Id. 420; *Hickerson v. Benson*, 8 Mo. 8; *Ball v. Gilbert*, 12 Met. 397; *Allen v. Hearn*, 1 T. R. 56; *M'Allister v. Hoffman*, 16 S. & R. 147; *Smyth v. M'Masters*, 2 Browne (Pa.) 182; *Bunn v. Riker*, 4 Johns. 426; *Lansing v. Lansing*, 8 Johns. 454; *Vischer v. Yates*, 11 Johns. 23; *Yates v. Foote*, 12 Id. 1; *Rust v. Gott*, 9 Cowen, 169; *Stoddard v. Martin*, 1 R. I. 1; *Denniston v. Cook*, 12 Johns. 376; *Brush v. Keeler*, 5 Wend. 250; *Lloyd v. Leisenring*, 7 Watts, 295; *Wagonseller v. Snyder*, Id. 343; *Worth v. Johnson*, 4 Harris & McH. 284; *Laval v. Myers*, 1 Bailey 486.

provided (s. 5) that money or valuables received as a deposit on any bet may be recovered back, with full costs of suit. (*i*) But nothing contained in the act is to extend (s. 6) to any person receiving or holding money or valuables by way of stakes or deposit to be paid to the winner of any lawful race, sport, or game, or to the owner of any horse engaged in any race.¹

278. Lawful games.—Playing at lawful games, such as horse-races, steeple-chases, and foot-races, or the game of dominoes, does not amount to gaming, unless bets are made, and money lost and won. If two persons intending to run a horse-race or foot-race against each other, or to engage in any lawful game, severally deposit sums of money or stakes in the hands of a stakeholder, to be awarded by him or an umpire to the winner of the race or game, an action may be maintained by the winner against such stakeholder for the recovery of the stakes; (*k*) but, if the amount of a bet is deposited in the hands of a stakeholder, to be awarded to the winner of the bet, the money cannot be recovered by the winner; (*l*) for all bets, though made upon a lawful game, are invalidated by the statute. (*m*)²

279. Notes, bills, and mortgages given to secure money won at, or lent for, play, are not absolutely void, but are deemed and taken to have been made

(*i*) *Doggett v. Cattermoss*, 34 L. J., 271; 17 L. J., C. P. 102. *Moon v. C. P.* 159; 19 C. B., N. S. 765. *Durden*, 2 Ex. 22.

(*k*) *Reg. v. Ashton*, 22 L. J., M. (m) *Parsons v. Alexander*, 24 L. J. Q. B. 277.

(*l*) *Varney v. Hickman*, 5 C. B.

¹ *Trimble v. State*, 27 Ark. 355; *Portis v. State*, 57 Ill. 360.

² Wagers as to the mode of playing, or to the result of any illegal game, as boxing, wrestling, cockfighting, &c., are void at common law. *McKeon v. Caherty*, 1 Hall, 300; *Hasket v. Wootan*, 1 Nott & McC. 180; *Atchison v. Gee*, 4 McCord, 211.

for an illegal consideration only; so that they are void only as between the original parties (*n*) and those persons who take them without consideration or with notice of the illegality of the consideration, or after they have become overdue. (*o*)¹

280. *Money knowingly lent for gaming*, or to be employed by the borrower in playing at cards, or dice, or any game of chance or skill in a common gaming-house, or in playing at the games of hazard, the ace of hearts, pharaoh, or basset, cannot be recovered from the borrower, as the lender is himself a party to the violation of the statutes prohibiting such games.² But money lent to play at whist, or cribbage, or any game not prohibited by act of parliament, may be sued for and recovered from the borrower, provided the loan is not part and parcel of a wagering or gaming contract. (*p*) If, therefore, a licensed publican lends money to a guest, to enable the latter to play at a game prohibited by law, or to lay bets or wagers on games of chance, the money so lent cannot be recovered. (*q*) But if a man, who has lost money at play, asks a friend to pay the money for him, the latter is entitled to recover the money from the party at whose request he advanced it, although he knew perfectly well, at the time he advanced the money, that it was lent to pay a gambling debt. (*r*) So, if a party loses a wager and requests another to pay it for him,

(*n*) *Cooke v. Stratford*, 13 M. & W. 379. 9 Anne, c. 14. 5 & 6 Wm. 4, c. 41. 8 & 9 Vict. c. 109, s. 18. (*p*) *McKinnell v. Robinson*, 3 M. & W. 434.

(*q*) *Foot v. Baker*, 6 Sc. N. R. 309;

(*o*) *Edmunds v. Groves*, 2 M. & W. 5 M. & Gr. 335.

642. *Hay v. Ayling*, 16 Q. B. 431.

(*r*) *Alcinbrook v. Hall*, 1 Wils. 309;

¹ A note given for a gambling debt is void, even in the hands of an innocent indorsee for value. *Unger v. Boas*, 13 Pa. St. 601.

² *Ruckman v. Bryan*, 3 Den. 340; *Reck v. Briggs*, Id. 340.

he is liable to the party so paying it, for money paid at his request. (s)¹

281. Usury laws.—The usury laws are repealed by the 17 & 18 Vict., c. 90. Bills of exchange given after the repeal of these laws, in renewal of bills given before that time to secure the repayment of money lent at usurious interest, are valid. (t)²

282. Sale by illegal weights and measures.—By the 5 Geo. 4, c. 74, and the 5 & 6 Wm. 4, c. 63, s. 6, amended by the 22 & 23 Vict., c. 56, provision is made for the establishment of uniform weights and measures, and penalties are imposed upon all persons who use any weight or measure other than those authorized by statute, or any weight or measure not stamped, or which shall be found light or otherwise unjust; and any contract made by any such weights or measures is declared void. By the 5 Geo. 4, c. 74, s. 15, the 16 & 17 Vict., c. 29, and the 18 & 19 Vict., c. 72, it is moreover enacted that all contracts for work to be done, or for goods, merchandise, or other things, to be sold, delivered, done, or agreed for, by weight or measure, where no special agreement shall be made to the contrary, shall be deemed to be made according to the standard weights and measures. The statutes for the establishment of uniform weights and measures do not prevent contracts from being made by any multiple or aliquot part of the pound weight. Where,

Knight v. Camber, 15 C. B. 564; 24 L. J., C. P. 121. *Jessop v. Lutwyche*, 24 L. J., Ex. 65. (s) *Rosewarne v. Billing*, 33 L. J., C. P. 55; 15 C. B., N. S. 316. (t) *Flight v. Reed*, 1 H. & C. 703; 32 L. J., Ex. 265.

¹ Gaming is regulated in the various states by statute. So, in Tennessee, selling "prize packages" of candy is held to be gaming, and indictable (*Eubanks v. State*, 3 Heisk. 488). And betting on "bagatelle" is in violation of the Virginia Code. *Neal's Case*, 2 Gratt. 917, &c., &c.

² See the statutes of the various states.

therefore a contract was made for the sale of iron, by what is called "long weight"—a well-known term used in the north to designate the long hundred of 120 lbs., as distinguished from the southern hundred of 112 lbs.—it was held that the contract was valid, as "the ton, long weight," was a multiple of the standard pound. (u) And where, on a sale by hobbet, it appeared that the hobbet was a local term designating a given number of pounds weight, it was held that this was a sale by the pound weight, the hobbet being a known multiple of a pound. (x) These statutes do not avoid contracts made in England for the sale of goods to be measured or weighed abroad. (y)

By the 33 Vict., c. 10, s. 6, every contract sale, payment, bill, note, instrument, and security for money, and every transaction, dealing, matter and thing whatever, relating to money, or involving the payment of or the liability to pay any money, which is made, executed, or entered into, done or had, shall be made, executed, entered into, done and had, according to the coins which are current and legal tender in pursuance of that act, and not otherwise, unless the same be made, executed, entered into, done or had according to the currency of some British possession or some foreign state.

283. *Illegal sale of coals.*—By the 5 & 6 Wm. 4, c. 63, s. 9, it is enacted that all coals, slack, culm, and cannel, shall be sold by weight and not by measure; and a penalty is imposed on all persons who sell such articles by measure and not by weight. In the case of coals sold in the metropolis and its environs, it is enacted (1 & 2 Wm. 4, c. 76, and 1 & 2 Vict., c. 101)

(u) *Jones v. Giles*, 10 Exch. 119; 24 L. J., Ex. 259, S. C. in Bl. 958; 23 L. J., Q. B. 356.

(x) *Rosseter v. Cahlmann*, 8 Exch. 361; 22 L. J., Ex. 128.

that, with any quantity of coals exceeding 560 lbs., delivered by wagon, bargè, or lighter, within twenty-five miles from the general post-office, the seller shall cause to be delivered to the purchaser, or his agent, a ticket, in the form prescribed in the act, before the coals are unloaded, on pain of forfeiture of £20. A penalty is imposed upon all persons who sell one sort of coals for another, or neglect to send a weighing-machine with the coals, and to weigh them at the request of the purchaser. If any of the requirements of these statutes are not complied with, the vendor is unable to sue for the price. (z) A weighing by putting the sacks of coals successively in one scale of the weighing-machine, against weights equal to the weight each sack should contain and an empty sack in the other scale, is not weighing according to the 54th section of the statute. (a) When the delivery is of a whole cargo of coals, direct from the vendor's coal-brig to the purchaser's wharf, without the intervention of lighters and barges, a ticket is not required. (b)

284. *Illegal sale of game.*—The 1 & 2 Wm. 4, c. 32, ss. 17, 25, 27, regulates the sale of game by game-keepers and persons who have taken out game certificates, and imposes a penalty upon all persons who sell game without a license to deal in game, or without having a game certificate, and upon all unlicensed persons who buy game from unlicensed dealers.'

285. *Illegal sale of spirituous liquors.*—The 24 Geo. 2, c. 40, s. 12, enacts that no person shall be en-

(z) *Little v. Poole*, 9 B. & C. 200. recovery of penalties, see *Collins v. Cundell v. Dawson*, 17 L. J., C. P. Hopwood, 15 M. & W. 463; 16 L. J., 311; 4 C. B. 376. *Tyson v. Thomas*, Ex. 124.
McClel. & Y. 119.

(b) *Blanford v. Morrison*, 15 Q. B. 724; 19 L. J., Q. B. 533.
 (a) *Meredith v. Holman*, 16 M. & W. 798; 16 L. J., Ex. 126. As to the

^a See the statutes of the various states.

titled to sue for the price of spirituous liquors, unless the debt shall have been bona fide contracted for at one time to the amount of 20s. or upwards, nor shall any particular item or article in any account or demand for distilled spirituous liquors be allowed and maintained, where liquors delivered at one time and mentioned in such article or item shall not amount to 20s. at the least. (c) But by the 25 & 26 Vict., c. 38, the 24th Geo. 2, c. 40, so far as it relates to spirituous liquors sold to be consumed elsewhere than on the premises where sold, and delivered at the residence of the purchaser thereof in quantities not less at any one time than a reputed quart, is repealed. Spirits mixed with water are spirituous liquors within the meaning of the Act. (d) If payments are made on account of a tavern bill containing items for spirits, together with other general items, and the tavern-keeper appropriates the payments in satisfaction and discharge of his claim for the spirits, his right of action for the rest of his demand is not affected by the statute. (e) By the 30 & 31 Vict., c. 142, s. 4, no action is thenceforth to be brought or be maintainable in any court to recover any debt or sum of money alleged to be due in respect of the sale of any ale, porter, beer, cider or perry which, after the commencement of that Act (1st of Jan. 1868), was consumed on the premises where sold or supplied, or in respect of any money or goods lent or supplied, or of any security given, for, on, or towards the obtaining of any such ale, &c.¹

(c) *Burnyeat v. Hutchinson*, 5 B. & 1 Exch. 281, 16 M. & W. 74. *Bailey Ald.* 241. *Hughes v. Lone*, 1 Q. B. *v. Harris*, 18 L. J., Q. B. 115; 13 Jur. 302. *Lansdale v. Clarke*, 1 Exch. 78. 341.

(d) *Scott v. Gilmore*, 3 Taunt. 226. See further as to what are spirits and spirituous liquors, *Att.-Gen. v. Bailey*,

(e) *Philpott v. Jones*, 2 Ad. & E. 41; 4 N. & M. 14. *Owens v. Denton*, 1 C. M. & R. 712.

¹ See the statutes of the various states.

286. *Illegal sale of poison.*—The sale of arsenic is regulated by the 14 & 15 Vict., c. 13, and that of other poisons by the 31 & 32 Vict., c. 121, and the 32 & 33 Vict., c. 117. (*f*)¹

287. *Illegal sale of petroleum and nitro-glycerine.* The sale of petroleum and other similar fluids is regulated by the 25 & 26th Vict., c. 66, and the 31 & 32 Vict., c. 56, and the sale of nitro-glycerine by the 32 and 33 Vict., c. 113, and see the 37 & 38 Vict., c. 51

288. *Chain-cables and anchors.*—By the 34 & 35 Vict., c. 101, s. 7, it is made unlawful for any maker of, or dealer in, chain-cables or anchors to sell, or contract to sell, for the use of any vessel, any chain-cable whatever, or any anchor exceeding in weight 168 lbs., unless they have been tested and stamped in accordance with the provisions of that Act, and the 27 & 28 Vict. c. 27.

289. *Smuggling.*—If goods are sold abroad for the purpose of being smuggled into this country, and the vendor knowingly packs the goods in a particular way to aid and assist the act of smuggling, or in any way shares or participates in the illegal transaction, he will not be permitted to sue upon the contract in any of our courts of justice. (*g*) If the vendor is merely cognizant of the intention of the purchaser to smuggle the goods, and confines himself simply to the act of selling, rendering no aid or assistance to the purchasers in the prosecution of the smuggling, our courts of law will not refuse to assist him to recover the price. (*h*) Although a foreigner is not bound to

(*f*) See *Berry v. Henderson*, L. 466. *Lightfoot v. Tenant*, 1 B. & P. R. 5 Q. B. 296; 39 L. J., M. C. 556.

77.

(*h*) *Holman v. Johnson*, 1 Cowp.

(*g*) *Biggs v. Lawrence*, 3 T. R. 341. *Pellecat v. Angell*, 2 C. M. & R. 454. *Clugas v. Penaluna*, 4 Id. 311.

¹ See the statutes of the various states.

take notice of the revenue laws of this country, yet, if he makes himself a direct party to the act of breaking them, he cannot here recover the fruits of his illegal act. (i)¹

290. *Illegal sale of exciseable articles.*—Many acts of parliament passed for the mere purpose of raising a revenue, require persons dealing in certain classes of goods to take out a license or permit, and impose a penalty upon them in case of their neglect so to do. The omission to take out a license, required for mere revenue purposes, does not render contracts of sale, entered into by such dealers in the way of their trade, unlawful, unless such contracts are expressly forbidden, but only exposes them to the penalty or fine imposed by the statute. (k) But, when the license is required for the protection of the public and the prevention of improper persons from acting in a particular capacity, and is not confined to revenue purposes, the imposition of the penalty amounts to a positive prohibition of the contract. (l) In order to legalize the

(i) *Waynell v. Reed*, 5 T. R. 600. 93; 5 M. & R. 114. *Wetherell v.*

(k) *Johnson v. Hudson*, 11 East, Jones, 3 B. & Ad. 221.

180. *Smith v. Mawhood*, 14 M. & W. (l) *Cope v. Rowlands*, 2 M. & W.

463. *Brown v. Duncan*, 10 B. & C. 157.

¹ A contract, which violates or proposes to violate the revenue laws of the country where it is made, is of course void. But, it seems, a contract may be lawfully made to violate the revenue laws of other countries (See 2 Parsons on Contracts, p. 754; *Ludlow v. Van Rennselaer*, 1 Johns. 94; *Kohn v. Schorner*, *Renaissance*, 5 La. Ann. 25). But an agreement made in Tennessee, in 1861, for the sale of a horse, which set forth that the horse was intended for service in the confederate cavalry, was held to be legal, if made within the confederate lines (*Gardner v. Barger*, 4 Heisk. 668. And see *Thetford v. McClintock*, 47 Ala. 647). Confederate notes, actually in circulation as money at the time and place where a contract is made, are a legal consideration for a contract. *Delmar v. Insurance Co.* 14 Wall. 661.

sale of wines, beer, and spirituous liquors, two licenses are necessary, one from the excise, the other from the magistrates in sessions. The license granted by the magistrates has no reference whatever to revenue purposes; it is required solely for the protection and preservation of public morals, and the prevention of crimes and offenses which are subversive of good order and the public safety. Every person, therefore, who sells wines, spirits, &c., without being duly licensed so to do, has no remedy for the recovery of the price thereof. (*m*) A brewer, who sells beer to be consumed in a public-house, is not bound to ascertain whether the party who orders the beer is duly licensed, before he supplies the article. (*n*) Mere knowledge, moreover, on the part of a vendor, that the buyer will make an illegal use of goods sold to him, is not sufficient to deprive the vendor of his right to payment of the price. It is necessary that the vendor should be a sharer in the illegal transaction, and should render some aid beyond that of merely selling the goods. (*o*)¹

291. Sunday sales and trading.—By the 29 Car. 2, c. 7, s. 1, commonly called the Lord's day act, it is enacted that no tradesman, artificer, workman, or laborer, shall exercise the worldly labor, business, or work of his ordinary calling upon the Lord's day (works of necessity and charity only excepted); and a penalty is imposed upon all persons of the age of fourteen years who offend against the statute. No

(*m*) *Ritchie v. Smith*, 6 C. B. 474; (*o*) *Hodgson v. Temple*, 5 Taunt. 18 L. J., C. P. 9. 181; 1 Marsh. 5.

(*n*) *Brooker v. Wood*, 5 B. & Ad. 1052; 3 N. & M. 96.

¹ Very many of the states of the Union have more or less stringent statutes regulating the sales of and traffic in liquor which see.

action, consequently, can be brought for the price of goods sold on Sunday in the ordinary course of trade or business of the vendor, (*p*) unless the sale is within the exception of the act, which permits (s. 3) food to be dressed and sold in inns, cook shops, and victualling houses, to persons who cannot be otherwise provided for, and milk to be carried about and sold at stated hours; or unless the sale is of bread, the baking and sale of which on Sundays are sanctioned under certain restrictions (5 & 6 Wm. 4, c. 37). (*q*) If the sale or other contract was not made in the exercise of the trade or ordinary calling of the party against whom it is sought to be enforced, it is not invalidated by the statute. (*r*) The sale of a horse, for example, by a person who is not a horse dealer, is not within the statute; and, if a sale is merely projected and proposed on a Sunday, and carried into effect on a subsequent week-day, it is not illegal. But, if the contract of sale is concluded on the Sunday, it will be void, although it may not be fulfilled by the delivery of the goods, until a subsequent week-day. (*s*)¹

(*p*) *Fennell v. Ridler*, 5 B. & C. 406; 8 D. & R. 204.

(*q*) The baking provisions for customers is a work of necessity within the exception of the Lord's Day Act. *Rex v. Cox*, 2 Burr. 787. *Rex v. Younger*, 5 T. R. 449.

(*r*) *Drury v. De Fontaine*, 1 Taunt. 131.

(*s*) *Bloxsome v. Williams*, 5 D. & R. 82; 3 B. & C. 233, 234. *Smith v. Sparrow*, 12 Moore, 206; 4 Bing. 84.

¹ And see *Watts v. Van Ness*, 1 Hill, 76; *Palmer v. New York*, 2 Sandf. 318; *Smith v. Wilcox*, 19 Barb. 581; 24 N. Y. 353; *Boydton v. Page*, 13 Wend. 425; *Wight v. Geer*, 1 Root, 474; *Northrup v. Foot*, 14 Wend. 248; *Morgan v. Richards*, 1 Browne, Pa. 171; *Kepner v. Keefer*, 6 Watts, 231; *Fox v. Mensch*, 3 Watts & S. 444; *Commonwealth v. Kendig*, 2 Pa. St. 448; *Berrill v. Smith*, 2 Miles, 402; *Johnston v. Commonwealth*, 22 Pa. St. 102; *O'Donnell v. Sweeney*, 5 Ala. 467; *Shippey v. Eastwood*, 9 Id. 198; *Dodson v. Harris*, 10 Id. 566; *Butler v. Lee*, 11 Id. 885; *Saltmarsh v. Tuthill*, 13 Id. 390;

If the goods are actually delivered to the purchaser under the void contract, the latter will have no right to detain them against the owner, unless it can be considered that both parties are in *pari delicto*. If the owner, subsequently to the void sale, demands on a week-day either the goods or the price, and the intended purchaser then promises to pay for them, a new and valid contract of purchase and sale arises between the parties which may be enforced by action.¹ But the law will not imply a promise to pay the price, from the mere fact of the detention or use and consumption of the goods. (*t*) The hiring by a farmer of a laborer or a servant is not an exercise of the farmer's ordinary calling, and, consequently, is not within the the letter or spirit of the act. (*u*) Neither is a contract by a farmer for the covering of a mare with a stallion; (*x*) nor an agreement by a solicitor to become personally responsible for the payment of the debt of a client. (*y*) Farmers, attorneys, and surgeons, moreover, do not range under the classes of persons (tradesmen, artificers, workmen, and laborers) mentioned in the statute. A coach proprietor, or the driver of a

(*t*) *Williams v. Paul*, 4 M. & P. 532; 1 M. & R. 456. *Reg. v. Silvester*, 33 6 Bing. 653. *Simpson v. Nicholls*, 3 L. J., M. C. 79.

M. & W. 240.

(*x*) *Scarfe v. Morgan*, 4 M. & W. 270.

(*u*) *Rex v. Whitnash*, 7 B. & C. 602; (*y*) *Peate v. Dicken*, 1 C. M. & R.

422.

Rainey v. Capps, 22 Id. 288; *Adams v. Hamell*, 2 Doug. 73; *Ray v. Catlett*, 12 B. Mon. 532; *Hilton v. Houghton*, 35 Me. 143; *Nason v. Dinsmore*, 34 Id. 391; *State v. Suheer*, 33 Id. 539; *Allen v. Deming*, 14 N. H. 133; *City of Cincinnati v. Rice*, 15 Ohio, 225; *Bloom v. Richards*, 2 Ohio St. 387; overruling *Sellers v. Dugan*, 18 Ohio, 489; *Swisher v. Williams*, *Wright*, 754; *Link v. Clemmens*, 7 Blackf. 479; *Reynolds v. Stevenson*, 4 Ind. 619. *Bloom v. Richards*, 2 Ohio St. 387, was to the effect that a sale of land, being not in the ordinary course of business of the parties, was not void.

¹ See *Gregg v. Wyman*, 4 Cush. 322; *Woodman v. Hubbard*, 5 Foster, 67.

hackney coach, is not a workman or laborer within the meaning of the statute; and a contract, therefore, for the hire of his coach or carriage, or a place therein, is not illegal, although made on a Sunday. (2)¹

(2) *Sandiman v. Breach*, 7 B. & C. 96; 1 M. & R. 457, n.

¹ But the reverse was held in *Johnston v. Commonwealth*, 22 Pa. St. 102. But a seaman is bound to work on Sunday as on any other day (*Ulary v. The Washington*, Crabbe, 204). And so it may be a work of charity to mend roads (2 *Parsons on Contracts*, p. 760, note). Judicial proceedings, like all others, have been held illegal in various states, on Sunday (See *Story v. Elliot*, 8 Cow. 27; *Kepner v. Keefer*, 6 Watts, 231; *Johnson v. Day*, 17 Pick. 106; *Bloom v. Richards*, 2 Ohio St. 387. See *Banks v. Werts*, 13 Ind. 203; *Amer. Law Mag. May*, 1860, p. 423). No judicial act can be done on Sunday (*Baxter v. People*, 3 Gilman, 268; *Shaw v. McCombs*, 2 Bay, 232; *True v. Plumley*, 36 Me. 466; *Hiller v. English*, 4 Strobb. 486; *Davis v. Fish*, 1 Greene, Iowa, 406). *Story v. Eliot*, 8 Cow. 27, held, that an award made and published on Sunday was void, an award being a judicial act. But see *Sargeant v. Butts*, 21 Vt. 99; *Tracy v. Jenks*, 15 Pick. 465; *Fox v. Abel*, 2 Conn. 541; *Commonwealth v. Wolf*, 3 S. & R. 48; *City Council v. Benjamin*, 2 Strobb. 508; *Specht v. Commonwealth*, 8 Pa. St. 312; *Read's Case*, 22 Gratt. 924.

Parsons, speaking of certain statutes as to the observance of Sunday (*Contracts*, ii. p. 763), says: "What constitutes the 'Lord's day,' within the provisions of these statutes, is usually determined by exact definition by the statutes themselves. Sometimes this is different for different purposes. In Massachusetts, no labor, &c., is to be done 'between the midnight preceding and sunsetting on the Lord's day,' but no civil process can be served between the midnight preceding and the midnight following that day. Under this statute it has been held, that a mortgage deed executed, acknowledged, and recorded, after sunset on Sunday evening, was not void as against an attaching creditor. In Connecticut, the 'Lord's day' has been defined as continuing from daybreak to the closing of daylight on Sunday.

"In Massachusetts and New York, and some other states, it is provided, that the Sunday laws shall not apply to those persons who conscientiously observe the seventh day of the week as the Sabbath, if they do not disturb others in their observance of Sunday. But in Pennsylvania and South Caro-

292. *Contracts for prohibited services.*—Printers are required (2 & 3 Vict. c. 12, s. 2; 32 & 33 Vict. c. 24) to affix their names and places of abode or business to all papers and books printed by them for publication; and if a printer neglects to comply with the requisitions of the statute, he cannot maintain an action for his labor, or for the materials provided for the printing. (a) But, as the name is required to be printed on the first or last leaf of every book, the omission might be rectified by the tender of the requisite printed leaf to the author or publisher at any time before actual publication. As soon as a printer discovers that he is printing libelous matter he ought to stop, and may then recover for what he has done; but, if he goes on with his printing, he makes himself a party to the unlawful transaction, and cannot recover his charges. (b)¹

293. *Unauthorized medical practitioners.*—By the medical act (21 & 22 Vict. c. 90, s. 32), it is en-

- (a) *Bensley v. Bignold*, 5 B. & Ald. L. J., Ex. 237. As to the registration of printing presses, see *Day v. Hemming*, 9 W. R. 703.
 340. *Marchant v. Evans*, 2 Moore, 14.
 (b) *Clay v. Yates*, 1 H. & N. 73; 25

lina, there is no such exception; and it has been contended, that the Sunday laws of those states were in this respect in violation of that provision in their constitutions which guarantees freedom of religious profession and worship to all mankind. But this view has not been sustained by the courts."

In *Nason v. Dinsmore*, 34 Me. 391, it was held, that a contract proved to have been made on the Lord's day is not thereby rendered invalid, unless it be also proved that it was made before sunset. The presumption is that it was made on that part of the day in which it was lawful to do it (*Hiller v. English*, 4 Strcbh. 486. See, also, *Hill v. Dunham*, 7 Gray, 543). A contract commenced on Sunday and completed on a week day is not necessarily void. 2 *Parsons on Contracts*, p. 764. And see, generally, *Parker v. Latner*, 60 Me. 528; *Hall v. Corcoran*, 1107 Mass. 251; *Moseley v. Hatch*, 108 Id. 517.

¹ *Morgan's Law of Literature*, vol. i. p. 193; vol. ii. ch. iii

acted that no person shall be entitled to recover any charge in any court of law for any medical or surgical advice or attendance, or for the performance of any operation or for any medicine which he shall have both prescribed and supplied, unless he shall prove, upon the trial, that he is registered under that statute. This section is not confined to cases in which the patient is sued; and an unregistered practitioner cannot sue a registered practitioner for medicine supplied to, or attendance upon, the patients of the latter at his request. (c) But every person registered under the act may sue for his reasonable charges, unless he is a fellow or member of a college of physicians which has passed a by-law prohibiting their fellows and members from suing for their charges, (d) in which case the by-law may be pleaded (s. 31) in bar to the action. This act, however, does not repeal sect. 21 of the apothecaries' act (55 Geo. 3, c. 194); and consequently a medical practitioner who is registered as a member of the college of surgeons only, and who has no other qualification, cannot recover for attendance and medicines supplied in other than surgical cases. (e) Proof of the registration of the plaintiff at the time of the trial has been held sufficient; and it is not necessary to show that he was registered at the time the services were rendered. (f) If a chemist attends patients, and applies and administers medicines, he practices as an apothecary, subjects himself to a penalty for so doing, and is disabled from suing for his charges. When an action has been brought to recover the

(c) *Alvarez de la Rosa v. Prieto*, 16 C. B. N. S. 578; 33 L. J., C. P. 962.

(d) *Gibbon v. Budd*, 2 H. & C. 92; 32 L. J., Ex. 182.

(e) *Leman v. Fletcher*, L. R., 8 Q. B. 319.

(f) *Turner v. Reynall*, 14 C. B. N. S. 328; 32 L. J., C. P. 164. *Haffield v. Mackenzie*, 10 Ir. Com. L. R. 289 Exch.

amount of a chemist's bill, and it is contended that the items are properly within the scope of an apothecary's profession, the proper question to be submitted to the jury, is, whether the plaintiff acted as a chemist or as an apothecary, and not whether he has charged as a chemist or an apothecary. (*g*)

294. *Unlicensed brokers.*—By the 6 Anne, c. 16, s. 4, and the 57 Geo. 3, c. lx., s. 2, any person who shall take upon him to act as broker, or employ any other under him to act as such, within the city of London and liberties, not being admitted by the court of mayor and aldermen, is liable to be fined. This has been taken to imply a prohibition of all unadmitted persons to act as brokers, and, consequently, to prohibit, by necessary inference, all contracts which such persons make for compensation to themselves for so acting. A broker, consequently, cannot sue for commission and charges in respect of work done or services rendered in the city of London, unless he has been duly licensed. (*h*) But the want of a license does not prevent the broker from maintaining an action for the recovery of money paid out of his own pocket for shares purchased by him by order of his principal. (*i*) By the 30 Vict., c. 23, s. 16, it is made unlawful for any broker, agent, or other person negotiating or transacting or making any sea insurances, to charge his employer any sum for his services, or for any money paid by way of premium, unless the policy is written on vellum, parchment, or paper, duly stamped; and every sum paid by such employer, contrary to that act, is to be deemed to have been paid without consideration, and is to remain the property

(*g*) *Richmond v. Coles*, 1 Dowl. N. S. 560.

(*h*) *Cope v. Rowlands*, 2 M. & W. 159.

(*i*) *Pidgeon v. Burslem*, 3 Exch.

470; 18 L. J., Exch. 193. *Smith v. Lindo*, 5 C. B., N. S. 587; 27 L. j.

C. P. 196. *Jessopp v. Lutwyche*, 10

Exch. 614.

of such employer, his executors, administrators, or assigns.

295. *Uncertificated solicitors.*—By the 37 & 38 Vict., c. 68, s. 12, “no costs, fee, reward, or disbursement, on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor without being duly qualified so to act, shall be recoverable in any action, suit, or matter, by any person or persons whomsoever.” By the 6 & 7 Vict., c. 73, it is enacted (s. 26) that no person who, as an attorney or solicitor, shall prosecute, defend, or carry on any proceeding, without having previously obtained a stamped certificate which shall then be in force, shall be capable of maintaining any action or suit for the recovery of any fee, or reward, or disbursement in respect of any business done by him as an attorney or solicitor whilst he shall have been without such certificate. (*k*) But the debt is still subsisting, although he can take no steps to enforce its payment; (*l*) and though uncertificated, and unable to sue for his fees, he may do acts, in his capacity of solicitor, which will be valid and will bind his client. (*m*)

296. *Contracts by waywardens.*—By the 26 & 27 Vict., c. 61, s. 1, no waywarden may, directly or indirectly, in his own name or in the name of any other person, contract for the repair of any road, or for any other work to be executed under the provisions of the 25 & 26 Vict., c. 61, within the parish for which he is elected waywarden, or within any other parish in the same district; and by s. 2 it is made unlawful for

(*k*) *Duke of Brunswick v. Crowl*, 4 Exch. 492.

(*l*) *In re Jones*, L. R., 9 Eq. 63; 39 L. J., Ch. 83. *Fullulove v. Parker*, 31 L. J., C. P. 239, 240.

(*m*) *Holdgate v. Slight*, 21 L. J., Q. B. 75. *Sparling v. Brerton*, L. R. 2 Eq. 64; 35 L. J., Ch. 461.

any highway board to pay, knowingly, for any repair or work so contracted for; and any money paid, by any board, under such contract, may be recovered by them from the person to whom the same shall have been paid. But, by the 27 & 28 Vict., c. 101, s. 20 any waywarden may contract for the supply or cartage of materials within the parish for which he is waywarden, with the license of two justices assembled at petty sessions, to be granted on such application as is therein provided.

297. *Illegality of contracts for the payment of work otherwise than in current coin.*—*The truck system.*—By the 1 & 2 Will. 4, c. 37, it is enacted (ss. 1, 19) that in all contracts for the hiring of any artificer in the iron or steel manufactures, or in the working of mines of coal, iron, limestone, or salt-rock, or the getting of stone, slate, or clay, or in the preparing of salt, bricks, tiles, or quarries or in the manufacturing of nails, chains, rivets, &c., spades, shovels, or any articles or hardwares of iron or steel, or plated articles of cutlery, or goods or wares made of brass, tin, or other metal, or of any japanned goods or wares, or in the spinning throwing, twisting, &c., weaving, combing, knitting bleaching, dyeing, printing, or otherwise, preparing of any kinds of woolen or worsted yarn, stuff, &c., cloth serge, cotton, leather, fur, hemp, flax, mohair, or silk manufactures whatsoever, or in the glass, porcelain, china, or earthenware manufacture, or in the making or preparing of bone, thread, silk, or cotton-lace, &c. the wages of such artificer shall be made payable in the current coin of the realm only; and that, if in any such contract the whole or any part of such wages shall be made payable in any other manner, such contract shall be illegal, null, and void. (n) Also (s. 2.)

(n) *Ashersmith v. Drury*, 28 L. J., M. C. 5: 1 El. & El. 46.

that, if, in any contract between any artificer in any of the trades enumerated and his employer, any provision shall be made "respecting the place where, or the manner in which, or the person with whom, the whole or any part of the wages" of such artificer shall be expended, such contract shall be illegal and void. All such artificers are empowered (s. 4) to sue for and recover any wages that have not been paid them in the current coin of the realm. Payment may, however be made (s. 8) in bank notes, if such artificer consent thereto. If any person is not hired to do the work himself, the fact of his being employed and contracting to get it done does not make him an artificer within the meaning of the act. The persons intended to be protected by the legislature are those who are hired to labor with their hands for daily wages. (o) A frame-work-knitter is an artificer within the meaning of the act. (p)

The object of this statute is to give the workman full remuneration for his labor and no more; and, therefore, deductions of sums which never belonged to the workman as part of his wages do not invalidate the contract. Thus, where the plaintiff, a frame-work-knitter, agreed with the defendant, an undertaker or middle-man, to make gloves at a certain agreed price per dozen, subject to a deduction of 1s. 6d. a week for the use of the frames furnished by such middleman, and 1s. 6d. a week as a remuneration for the use of a workshop, and for his trouble in procuring and conveying to the plaintiff materials for his work and

(o) *Riley v. Warden*, 2 Exch. 59. & Bl. 115, 132; 26 L. J., Q. B. 82
Sharman v. Sanders, 22 L. J., C. P. 86; *Sleeman v. Barrett*, 33 L. J., Ex. 153
 13 C. B. 166. *Weaver v. Floyd*, 21 L. J., Q. B. 151; 2 H. & C. 934.
 16 Jur. 289. *Bowers (p) Moorhouse v. Lee*, 4 F. & F
v. Lovckin, 6 Ell. & Bl. 584; 25 L. J., 355.
 Q. B. 371. *Ingram v. Barnes*, 7 Ell.

returning them safe to the master manufacturer, also 7*d.* per week for winding the yarn, and a penny in the shilling on the amount of the plaintiff's weekly earnings above 14*s.* in the week net for repairs of certain machinery, all which deductions were fair and reasonable, and in accordance with the custom and usage of the trade, it was held that the contract was not invalidated by the statute. (q) If the employer set up a shop, and make use of any compulsion to induce his workmen to lay out their wages at this shop, the wages thus received and compulsorily expended at the employer's shop are not, it seems, valid payment of wages, but are within the mischief intended to be provided against by the truck acts. (r)

298. By the 1 & 2 Will. 4, c. 37, s. 23, the employer may contract to supply the artificer with medicine, medical attendance, and materials to be employed in his occupation if a miner, and may demise to the artificer a tenement at any rent reserved, and may contract to make stoppages or deductions from the wages in respect of rent, medical attendance, &c., provided the contract for such stoppages is in writing (s) and signed by the artificer. The amount to be deducted in respect of each head of deduction need not be specified in the contract. (t) The employer may deduct 6*d.* a week for medicine to be paid by the miner towards a club kept by the employer for the purpose of providing medicine and medical attendance for such miners as may require them; (u) but, in order to be valid, the contract for the supply of materials

(q) *Chawner v. Cummings*, 8 Q. B. 325; 15 L. J., Q. B. 161. But see now the Hosiery Manufacture (Wages) Act, 1874 (37 & 38 Vict. c. 48), § 1, 2, 5, by which these deductions or stoppages are made illegal.

(r) *Olding v. Smith*, 16 Jur. 457.

(s) *Pillar v. Lynvi Coal Co.*, L. R., 4 C. P. 752.

(t) *Cutts v. Ward*, L. R., 2 Q. B. 357; 36 L. J., Q. B. 161.

(u) *Cutts v. Ward*, *supra*.

must be an absolute contract of sale, and not a mere contract of hiring by the artificer. (*x*) Deductions or stoppages in the hosiery trade in respect of frame-rent, machine-rent, standing of frames and machines, winding the material, fines for irregular attendance, gas for lighting the factory, and fire in waiting-room, amounting to about 3*s.* 9*d.* per week, and being fixed charges, have been held not to be illegal. (*y*)

299. *Divisible contracts, part being good and part bad.*—If there are several considerations for separate and distinct contracts, and one is good and the other bad, the one may stand and be enforced, although the other fails. The invalidity of the one will not necessarily induce the destruction of the other. (*z*) If a deed of conveyance contains limitations and grants of land and tenements to uses, some of which are charitable uses within the 9 Geo. 2, c. 36, the deed will be void so far as it relates in the charitable uses, but valid so far as it passes the other lands to the other uses. (*a*) If a settlement contains provisions for the case of a future separation between the husband and wife, those provisions are void; but the rest of the settlement may be valid. (*b*) Where a rector granted a yearly rent-charge, payable out of his benefice, and covenanted to pay the rent-charge, and the grant was avoided by the 13 Eliz, c. 30, it was held that the rector was nevertheless liable upon his covenant to pay annually to the plaintiff the amount intended to have been charged upon the benefice. And, where a bill of sale of a ship, made by way of mortgage, was

(*x*) *Cutts v. Ward*, L. R., 2 Q. B. 357; 36 L. J., Q. B. 161.

(*y*) *Archer v. James*, 2 B. & S. 61; 31 L. J., Q. B. 153, note (*q*), p. 436.

(*z*) *Collins v. Blantern*, 2 Wils. 341. *Bishop of Chester v. Freeland*, Ley, 79; 1 Vin. Abr. 332.

(*a*) *Doe v. Pitcher*, 6 Taunt. 369. *Howe v. Synge*, 15 East, 440.

(*b*) *Merryweather v. Jones*, 4 Giff. 509. *Hamilton v. Hector*, L. R. 13 Eq. 511, 6 Ch. 701; 40 L. J. Ch. 692.

void for not reciting the certificate of registry therein, it was held that the mortgagor was liable, upon his personal covenant contained in the same deed, for the re-payment of the money advanced on the intended security of the vessel. (c) Where, on a contract for the sale of a perfumer's business, the vendor covenanted not to carry on the trade of a perfumer within the cities of London and Westminster, or within the distance of 600 miles from the same, it was held that the covenant was good so far as it related to the cities of London and Westminster, though it was void as to the 600 miles. (d) So where a bill of exchange was accepted to secure payment of a sum of money, consisting partly of a debt from which the acceptor had been discharged under the insolvent debtor's act and partly of a new debt, it was held that the bill was a valid security as to the latter, although it was void as regarded the former debt. (e) And, where there are separate and independent covenants in the same deed, the illegality of one of the covenants does not invalidate the others. (f) These cases come within the rule laid down by Hutton, J., that, "when a good thing and a void thing are put together in one self-same grant, the law shall make such a construction that the grant shall be good for that which is good, and void for that which is void," and also within the maxim, "Utile per inutile non vitiatur." Where there are two considerations, the one good and the other bad, and general damages have been recovered, they will be deemed to have been

(c) *Mouys v. Leake*, cited *Kerrison v. Cole*, 8 East, 231.

(d) *Price v. Green*, 16 M. & W. 346; 16 L. J., Ex. 108. "London" means the city of London, and not the me-

tropolis generally. *Mallan v. May*, 13 M. & W. 517.

(e) *Sheerman v. Thompson*, 11 Ad. & E. 1027.

(f) *Wigg v. Shuttleworth*, 13 East, 87.

given in respect of the good consideration alone.
(*g*)

300. Indivisible contracts.—If there is one entire consideration for two several contracts, and one of these contracts is for the performance of an illegal act, the whole is void. Thus, where one sum is to be paid for the doing of a legal and an illegal act, the whole contract is void. (*h*) And, if a contract or promise be founded upon a legal and an illegal consideration, and the illegal consideration cannot be separated from the legal consideration and rejected, the illegality of part vitiates the whole. (*i*) Where a bill of exchange was given to secure payment of a debt, part of which consisted of money lawfully advanced, and the rest of money due upon an illegal sale, it was held that the good part of the consideration for the bill could not be separated from the rest, and that the whole was illegal and void. (*k*) Every secret bargain in fraud of creditors is void when it is made, and cannot be enforced even against a fraudulent party; and, when a part is fraudulent, the bargain being entire, is altogether fraudulent and void. The creditor, therefore, can enforce no part of it; and it is no matter that part of the agreement is by deed and part by parol. (*l*) If, upon a contract for the hiring and service of a housekeeper at certain agreed wages, it appears to have been part of the contract that the housekeeper should cohabit with her master, the whole will be void, and the wages irrecoverable. (*m*) Where a verbal agreement was made to pay the debt of a third party (which is

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| (<i>g</i>) <i>Ley</i> , 79. <i>Best v. Jolly</i> , 1 Sid. 38. | <i>Thomas v. Williams</i> , 10 B. & C. 671. |
| (<i>h</i>) <i>Hopkins v. Prescott</i> , 16 L. J., C. P. 263; 4 C. B. 578. | <i>Fergusson v. Norman</i> , 6 Sc. 810. |
| (<i>i</i>) <i>Featherstone v. Hutchinson</i> , Cro. Eliz. 199. | <i>Willyams v. Bullmore</i> , 32 Beav. 574; 33 L. J., Ch. 461. |
| (<i>k</i>) <i>Scott v. Gillmore</i> , 3 Taunt. 226. | (<i>l</i>) <i>Higgins v. Pitt</i> , 4 Exch. 324. |
| | (<i>m</i>) <i>Rex v. Northwingfield</i> , 1 B. & Ad. 912. |

void, as we have before seen, by the statute of frauds, unless it is authenticated by writing), and to pay certain expenses connected therewith, it was held that the agreement was indivisible, and the whole invalid. (n) Upon a contract for the sale of tobacco, it was agreed that counterfeit money should be taken in payment, and, the tobacco having been delivered and the counterfeit money sent, the vendor refused to receive it, and brought an action for the price of the tobacco; but, per Buller, J., "It cannot be said that the sale is good and that the payment is bad; if it be an illegal contract, it is equally bad for the whole. . . . The parties are in *pari delicto*, and *potior est conditio defendentis*. (o)¹

301. *Void foreign contracts.*—As a general rule, a contract will not be enforced, unless it is valid by the law both of the country in which it was made and of that in which it is sought to be enforced. (p)²

(n) *Lexington v. Clarke*, 2 Ventr. (o) *Alexander v. Owen*, 1 T. R. 227.
223. *Chater v. Beckett*, 7 T. R. (p) *Hope v. Hope*, 8 D. M. & G.
201. 731.

¹ A contract performable in different items, where the consideration to be paid is proportionate to each item, either actually or by implication of law, will be held to be severable (*Cunningham v. Morrell*, 10 Johns. 203). But this doctrine is altogether denied in *Andrews v. Durant*, 1 Kern. 35. See, also, *Wood v. Bell*, 5 Ellis & B. 772; 34 E. L. & E. 178; 6 Ellis & B. 355; *Moody v. Brown*, 34 Me. 107; 1 Parsons' Mar. Law, 75, n. 1; *Clark v. Baker*, 5 Metc. 452; *Perkins v. Hart*, 11 Wheat. 237, 251; *Withers v. Reynolds*, 2 B. & Ald. 882; *Sickels v. Patterson*, 14 Wend. 257; *McKnight v. Dunlop*, 4 Barb. 36, 47; *Snook v. Fries*, 19 Id. 313; *Carleton v. Woods*, 8 Foster, 290; *Robinson v. Snyder*, 25 Pa. St. 203.

² Parsons states the rule somewhat differently. All laws duly made by any state bind all persons and things within that state (2 Contracts, p. 568). Or its own citizens or subjects, wherever they may be, as to all obligations which home tribunals can enforce (Id.). A contract valid in the country where it is made, is valid everywhere, and if void there, is void everywhere (p. 570). See *Planche v. Fletcher*, 1 Doug. 251.

302. Effect of avoidance.—A person who has authorized the application of his money to an illegal purpose, may revoke the authority and recover back the money at any time before it has been paid over; (*q*) and so long as an illegal contract remains executory and unperformed, money deposited by one of the parties, in furtherance of the fulfillment of the contract, may be recovered back; (*r*) but not when the parties have carried out their unlawful intention, and the illegal act has been accomplished, and both are in *pari delicto*. (*s*)

303. Money lost at play, (*t*) or paid for the purpose of procuring a pardon, (*u*) or for insurance in the nature of a wager, (*x*) or for supplying wine, &c., for a debauch at a brothel, (*y*) or for compounding a felony, or purchasing false evidence, or inducing a party not to appear and give evidence at a trial, cannot be recovered from the person to whom it has been paid. (*z*) If indentures of apprenticeship are void by

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| (<i>q</i>) Bone v. Ekless, 29 L. J., Ex. 438. | (<i>u</i>) Norman v. Cole, 2 Esp. 253. |
| (<i>r</i>) Walker v. Chapman, cited 2 Doug. 471 a. | (<i>x</i>) Edgar v. Fowler, 3 East. 225. |
| (<i>s</i>) Palyart v. Leckie, 6 M. & S. 293. | (<i>y</i>) Taylor v. Chesler, L. R., 4 Q. B. 309; 38 L. J., Q. B. 225. |
| Wilson v. Ray, 10 Ad. & E. 88. | (<i>z</i>) Si dantis et accipientis turpis causa sit, possessorem potiorum esse. |
| (<i>t</i>) Thistlewood v. Cracroft, 1 M. & S. 500. | Webb v. Bishop, Bull. N. P. Dig. lib. 12, tit. 5, lex. 6. |

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Ludlow v. Van Rensselaer, 1 Johns. 94; Wilcox v. Hunt, 8 Pet. 378; Van Reimsdyk v. Kane, 1 Gallis, 371; Touro v. Cassin, 1 Nott & McC. 173; Houghtaling v. Ball, 20 Mo. 563; McIntyre v. Parks, 3 Metc. 207; Robinson v. Bland, 2 Burr. 1077; Burrows v. Jemino, 2 Stra. 733; La Jeune v. Eugenie, 2 Mason, 459; Clegg v. Levy, 3 Camp. 166; Willings v. Consequa, Pet. C. C. 317; Pearsall v. Dwight, 2 Mass. 88; Smith v. Mead, 3 Conn. 253; Medbury v. Hopkins, Id. 472; Houghton v. Page, 2 N. H. 42; Dyer v. Hunt, 5 Id. 401; Gassett v. Godfrey, 6 Foster, 415; Smith v. Godfrey, 8 Id. 379; Whiston v. Stodder, 8 Mart. (La.) 95; Andrews v. His Creditors, 11 La. 464; Young v. Harris, 14 B. Mon. 559; Bank of United States v. Donnally, 8 Pet. 361; Andrews v. Pond, 13 Id. 65.

reason of the amount of the premium paid with the apprentice not being truly or correctly stated, pursuant to the requirements of the stamp acts, the money actually given with the apprentice cannot be recovered back, on the ground of a failure of consideration, as both parties are in *pari delicto*. (a) When, however, the parties are not in *pari delicto*, the most innocent of the two may obtain the assistance of the law for the recovery of money paid by him to the other, under the illegal contract, although the unlawful act may have been fully accomplished. And it has recently been held that a debtor paying money to one creditor, as the price of procuring a fraud on his other creditors before the creditors enter into a composition, can recover back the money, the parties not being in *pari delicto*. (b) "If the contract," observes Domat, "is unlawful only on the part of him who receives, and not on the part of him who gives, he who has given money under the contract may recover it back, although the contract has been fulfilled by the receiver of such money. But if the contract is unlawful, both on the one side and on the other, as if one party gives money to a judge to gain his cause, or one person gives money to another to induce him to commit a crime, he who has thus given his money is justly deprived of what he has expended, and cannot recover it back." (c)¹

304. *Money in the hands of depositaries and stakeholders.*—The 8 & 9 Vict. c. 109, s. 18, which enacts (*ante*, p. 209) that no action shall be brought for recovering any money or valuable thing deposited

(a) *Stokes v. Twitchen*, 2 Moore, 538.

(c) *Les Lois Civ. liv. 1. tit. 18, n.*

(b) *Atkinson v. Denby*, 30 L. J., 14, 5.

Ex. 361; 31 *Id.* 362; 7 H. & N. 934.

¹ See note 1, p. 416.

in the hands of any person to abide the event on which any wager shall have been made, was intended to prevent the recovery of the stake by the party who assumed to have won the wager, and not to prevent either of the parties depositing the money with a stakeholder from withdrawing his assent to the contract before the determination of the wager, and thus, of his own free will, preventing the result which the act was passed compulsorily to prevent. (*d*) So long as the money has not been actually paid over, by the stakeholder or depositary, to the winner, it may be recovered back by the depositor, (*e*) but not afterwards, (*f*) unless previous notice has been given not to pay over the money. (*g*)¹

(*d*) *Varney v. Hickman*, *ante*, 210. (*f*) *Howson v. Hancock*, 8 T. R. 575.
Martin v. Hewson, 24 L. J., Ex. 174.

(*e*) *Cotton v. Thurland*, 5 T. R. 405. (*g*) *Hastelow v. Jackson*, 8 B. & C. 221. *Bone v. Ekless*, 5 H. & N. 925;
Farmer v. Russell, 1 B. & P. 296; *Tenant v. Elliot*, Id. 3. Mar-
ryat v. Broderick, 2 M. & W. 369. 29 L. J., Ex. 438.

¹ See note 1, page 416.

SECTION II.

VOIDABLE CONTRACTS.

305. *Of the avoidance of contracts on the ground of fraud and unfair dealing.*—If one man obtain another's money by reason of a promise to do some particular thing, and refuses to do it, but keeps the money, it is a fraud; and it is at the election of the party injured either to affirm the contract, by bringing an action for the non-performance of it, or to disaffirm it, *ab initio*, by reason of the fraud, and bring an action for the money. (*k*)' If a person obtains goods under a contract of sale, with the fraudulent intention of never paying for them, the contract is void as far as the vendor is concerned, and the goods may be recovered by the latter, (*i*) provided he makes his election before the goods have been resold and transferred to a bona fide purchaser; (*k*) but if the vendor does not think fit to avail himself of the fraud, he may treat the contract as a subsisting contract, and sue for the price. Where a workman has agreed to do a certain job for a certain sum, upon the faith of a false and fraudulent representation by the employer, the workman may treat the special agreement as a nullity, and sue for the recovery of a fair and reasonable remuneration. (*l*) But if the workman has exercised his own

(*k*) Mansfield, C. J., *Moses v. Macferlan*, 2 Burr. 1011.

(*i*) *Load v. Green*, 15 M. & W. 216. *Abbots v. Barry*, 5 Moore, 98.

(*k*) *White v. Garden*, 10 C. B. 919; 20 L. J., C. P. 167.

(*l*) *Selway v. Fogg*, 5 M. & W. 86.

¹ *Sandborn v. Batchelder*, 51 N. H. 426.

judgment and skill" in the matter, and ought not to have depended upon the representation of the employer, he will not be permitted to avoid the contract on the ground of fraud. (m) If a man is drawn in to drink, in order that he may be thrown off his guard, and an unfair and hard bargain be imposed upon him, the contract cannot be enforced. (n) Where a fraudulent misrepresentation "*dans locum contractui*," or giving occasion to the contract, has been made by one who is no party to the contract, there the contract cannot be avoided; but the person who made the representation will be compelled in equity to make good his assertion as far as this may be possible. But, where the false representation has been made by a person who is a party to the agreement, then the contract may be avoided by the party who has been deceived. (o) But a contract cannot be avoided by reason of a representation concerning some matter altogether collateral to the contract. Where, therefore, an agreement was entered into for the letting and hiring of apartments, on the strength of a representation by the hirer that he wanted them for a perfumer's business, and, as soon as the agreement was executed, and he had obtained possession, he used the premises as a common bawdy house, it was held that the landlord had no right to avoid the contract and treat the tenant as a trespasser. (p) Where, however, a tenant, holding under a lease which was not assignable without the consent of the landlord, was desirous of selling his lease, and the plaintiff, in order to obtain

(m) *Baily v. Merrell*, 3 Bulstr. 94.

(n) *Johnson v. Medlicott*, 3 P. Wms. 130, in notis. *Pitt v. Smith*, 3 Campb. 33.

(o) *Pulsford v. Richards*, 17 Beav.

95, 22 L. J., Ch. 559. *Rawlins v. Wickham*, 28 L. J., Ch. 188. *Ld. Wensleydale, Smith v. Kay*, 30 Id. 61; 7 H. L. C. 775.

(p) *Feret v. Hill*, 15 C. B. 225; 23 L. J., C. P. 186.

an assignment of the lease to a friend, represented the latter to be a responsible and eligible person, and, upon the faith of this representation, obtained from the defendant an agreement to assign the lease to such friend, and also the landlord's written consent to the assignment, and the representation was false to the knowledge of the plaintiff at the time he made it, and therefore fraudulent, it was held that the representation went to the very essence of the contract, and entitled the defendant to rescind the agreement. (q)¹

306. *False representations.*—In order to entitle a party to rescind a contract, it is sufficient to show that there was a fraudulent representation as to any part of that which induced him to enter into the contract. But, when there has only been an innocent misrepresentation, it is no ground for a rescision, unless it was such that there is a complete difference in substance between the thing bargained for and that obtained, so as to constitute a failure of consideration. (r) A representation is made fraudulently, when it is made with a knowledge of its untruth, or dishonestly with a reckless ignorance whether it is true or untrue. (s) Where there has been a fraudulent misrepresentation, or a willful concealment of fact, by which a person has been induced to enter into a contract, it is no

(q) *Canham v. Barry*, 24 L. J., C. P. 100; 15 C. B. 603.

(r) *Kennedy v. Panama, &c. Royal Mail Co.*, 36 L. J., Q. B. 260; L. R., 2 Q. B. 580.

(s) *Behn v. Burness*, 3 B. & S. 751; 32 L. J., Q. B. 204. *Reese River Silver Mining Co. v. Smith*, L. R., 4 H. L. 64; 39 L. J., Ch. 849.

¹ *Sanborn v. Batchelder*, 51 N. H. 426. But the party who would rescind must restore, or offer to restore, any advantage or benefit he may have received; he cannot, at the same time, rescind and take advantage of a contract (*Id.*). And he must do so at once, upon discovery of the fraud. *Bruce v. Davenport*, 6 Abb. (N. Y.) App. Dec., and cases cited; and see *King v. Fitch*, 2 *Id.* 508.

answer to his claim to be relieved from it that he might have known the truth by proper inquiry. (*t*) If a person makes a representation calculated to induce another to assume a particular liability, and the circumstances are afterwards, before liability assumed, so altered to the knowledge of the person making the representation that the alteration might affect the course of conduct of the person to whom the representation was made, it is the imperative duty of the person who made the representation to communicate to the person to whom he made it the alteration of those circumstances; and the person to whom the representation has been made, will not be bound in equity by any contract entered into on the faith thereof, unless such a communication has been made. (*u*) But, in the case of a sale, the maxim *caveat emptor* applies; and the vendor is not bound to inform the purchaser that he is laboring under a mistake in no way induced by the act of the vendor. (*x*)

307. *Fraudulent concealment.* — Suppression of the truth, as much as misrepresentation of a material fact, will vitiate any contract the validity of which depends upon the truth and accuracy of the representation on which it was made. (*y*) Where the trustee of a deed of separation obtained a covenant from the husband to pay him an annuity for the wife's benefit, and the trustee concealed from the husband the fact that, at the time of the execution of the deed and covenant, he had committed adultery with the wife, it was held that the husband might avoid the deed. (*z*)¹

(*t*) *Venezuela Co. v. Kisch*, L. J., 2 H. L. 99; 36 L. J., Ch. 849.

(*u*) *Trill v. Baring*, 33 L. J., Ch. 521.

(*x*) *Smith v. Hughes*, L. R., 6 Q. B. 597; 40 L. J., Q. B., 221.

(*y*) *Prideau v. Lonsdale*, 4 Giff. 159.

(*z*) *Evans v. Edwards*, 22 L. J., C. P. 214.

¹ So where a father suppressed the fact of his son's minority

308. *Fraud by means of agents.*—If a principal desirous of selling or letting property, knows of a latent defect, and expressly authorizes his agent to state that it does not exist, or to make any statement of similar import, or if he purposely employs an agent ignorant of the truth, in order that such agent may innocently make a false statement, believing it to be true, and may so deceive the party with whom he was dealing; in either of these cases, the representation of the agent will be the representation of the principal, and, coupled with the principal's knowledge of its falsehood, will be a fraud.¹ There is no implied warranty or undertaking on the part of the lessor of realty, that it is fit for the purpose for which it is let, or that it is in any particular state or condition at the time of the demise; and it has accordingly been held that, although a principal who employs an agent to let a house knows that the house is incumbered with a nuisance of so serious a nature as to render it an unfit place of residence for any family of respectability, yet he is not guilty of any fraud in the eye of the law by neglecting to make known the existence of the nuisance to the agent, and through him to the parties who contract for the hiring of the house. (a)²

309. *Fraudulent misrepresentations by directors of companies.*—The same rules as to false or deceptive representations which are applicable to contracts between individuals are also applicable to contracts be-

(a) *Cornfoot v. Fowke*, 6 M. & W. 358.

(*Kidney v. Stoddard*, 7 Metc. 252). And see *Jackson v. Wilcox*, 1 Scam. 344.

¹ See, also, *Franklin v. Ezell*, 1 Sneed, 497; *Carpenter v. American Ins. Co.* 1 Story, 57; *Hynes v. Jungren*, 8 Kan. 391; *Tucker v. Woolsey*, 64 Barb. 482.

² As to fraud by agents, see *King v. Fitch*, 2 Abb. (N. Y.) App. Dec. 508, and cases cited.

tween an individual and a company. No misstatement or concealment of any material facts or circumstances can be permitted in a prospectus issued to invite persons to become shareholders in a projected company. The public are in such a case entitled to have the same opportunity of judging of everything material to a knowledge of the true character of the undertaking as the promoters themselves possess. (*b*) But there must be a misrepresentation of some matter of fact, and not merely an incorrect statement of matter of law. (*c*) Mere exaggerated views of the advantages of the company, not containing any material misstatement of fact, are not sufficient to avoid the contract. (*d*) Where an applicant for shares agrees to be bound by the articles and memorandum of association, he must be taken to have notice of their contents, but not of documents referred to in them and misrepresented by the prospectus. (*e*) Where a person believes that he has been misled by representations which are false or deceptive into taking shares in a proposed company, it is his duty to raise the objection at an early period, and to be guilty of no needless delay. (*f*) But the contract between a shareholder who has been deceived by a fraudulent prospectus and the company is voidable only, and not void, and can only be avoided subject to the rights of creditors. (*g*)

(*b*) *Venezuela Co. v. Kisch*, L. R., 2 H. L. 99; 36 L. J., Ch. 849.

(*c*) *Rashdall v. Ford*, L. R., 2 Eq. 750; 35 L. J., Ch. 769. *Beattie v. Lord Ebury*, L. R., 7 Ch. 777; 41 L. J., Ch. 804.

(*d*) *Denton v. Macneil*, L. R., 2 Eq. 352.

(*e*) *Kisch v. Venezuela Ry. Co.*, 34 L. J., Ch. 545.

(*f*) *Venezuela Co. v. Kisch*, *supra*. *Ashley's Case*, L. R., 9 Eq. 263; 39 L. J., Ch. 354. *McNiell's Case*, L. R., 10 Eq. 503; 39 L. J., Ch. 822. *Bwlch-y-plwm Lead Mining Co. v. Baynes*, L. R., 2 Ex. 324; 36 L. J., Ex. 183.

(*g*) *Oakes v. Turquand*, 36 L. J., Ch. 949; L. R., 2 H. L. 325. *Kent v. Freehold Land Co.*, L. R., 3 Ch. 493; 37 L. J., Ch. 653.

310. *Fraudulent misreading of a deed.*—If a man who cannot read, executes a deed which is falsely read, or the sense declared different from the truth, the deed will not bind him. (*h*) “It is at the peril of the party to whom the deed is made that the true effect and purport of the writing be declared if it be required; but, if the party who should deliver the deed doth not require it, he shall be bound by the deed, although it be penned against his meaning.” (*i*)

So, where the defendant's signature upon the back of a bill of exchange was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and was not guilty of any negligence in so signing the paper, it was held that he was not liable in an action against him as indorser by a bona fide holder for value. (*k*)

311. *The effect of fraud* is not absolutely to avoid a contract induced by it, but to render it voidable at the option of the party defrauded; (*l*) and the contract continues valid until the party defrauded has determined his election by avoiding it. (*m*) In the case, therefore, of a sale or purchase obtained by fraud, the property in the thing sold passes by the contract until the contract is avoided, so that an innocent party buying from a fraudulent purchaser may acquire an indisputable title to the subject-matter of the contract, though the contract is voidable as between the original parties. All mesne dispositions of the prop-

(*h*) 2 Rolle's Abr. 28, FARRS, S. Simons v. Gt. West Ry. Co., 2 C. B., N. S. 620; 26 L. J., C. P. 25. Com. Dig. Fait (B. 2).

(*i*) Thoroughgood's Case, 2 Co. 9, a. b.

(*k*) Foster v. Mackinnon, L. R., 4 C. P. 704; 38 L. J., C. P. 310.

(*l*) Reese River Silver Mining Co. v. Smith, L. R., 4 H. L. 64; 39 L. J., Ch. 849.

(*m*) Clough v. London & Northwestern Ry. Co., L. R., 7 Ex. 26, 34; 41 L. J., Ex. 17.

erty, to persons not cognizant of the fraud are valid. (n)¹

312. *Determination of the power of avoidance.*—A party who intends to repudiate a contract on the ground of fraud should do so as soon as he discovers the fraud; for if, after the discovery of the fraud, he treats the contract as a subsisting contract, or if, in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected, (o) he will be deemed to have waived his right of repudiation, and must then bring an action for damages for the deceit. (p) And whenever a party to a contract has a right to elect whether he will avoid it or treat it as a subsisting contract, his election may be manifested by acts as well as by words, and when once made is final, and cannot be retracted. (q) Moreover, lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and, when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined. But the mere fact that one who is a party to the fraud has issued a writ and commenced an action before the rescision, is not such a change of position as

(n) *White v. Garden*, 10 C. B. 927. *Universal Marine Ins. Co., L. R.*, 8 Stevenson v. Newnham, 13 C. B. 302; Ex. 196, 204.

22 L. J., C. P. 110.

(p) *Selway v. Fogg*, 5 M. & W.

(o) *Clough v. London & North-western Ry. Co.* L. R., 7 Ex. 26, 35; 41 L. J., Ex. 17.

86. *Read v. Hutchinson*, 3 Can. ph. 352.

Morrison v. The

(q) *Ward v. Day*, 33 L. J., Q. B. 13. Com. Dig. Election, C. 2.

¹ See as to the rule, *Burton v. Stewart*, 3 Wend. 236; *Thayer v. Turner*, 8 Metc. 550; *Kimball v. Cunningham*, 4 Mass. 502; *Perley v. Balch*, 23 Pick. 283; *Stevens v. Austin*, 1 Metc. 557; *Howard v. Cadwalader*, 5 Blackf. 225; *Newell v. Turner*, 9 Porter, 420; *Barnett v. Stanton*, 2 Ala. 181; *Carter v. Walker*, 2 Rich. 40; *Bacon v. Brown*, 4 Bibb. 91.

will preclude the defrauded party from exercising his election to rescind; nor is it necessary that there should be a declaration of his intention to rescind prior to the plea. (r) And the discovery of a new incident in the fraud, which only strengthens the evidence of the original fraud, cannot revive a right of repudiation which has once been waived. (s)

The right of repudiation of a contract, on the ground of fraud, does not prevail where a man has, by his own act, put it out of his power to place the parties in the same position as they were in at the time the contract was made. A purchaser who has obtained possession of property under a contract of sale cannot rescind the contract on the ground of fraud, and bring an action for the recovery of the purchase-money, unless he can restore the subject-matter of the sale to the vendor. Thus, if a butcher has bought live cattle, upon the faith of a fraudulent representation, he cannot, after he has killed the cattle, rescind the contract and recover back the price, but he must bring an action for damages for the deceit. (t) And if a voidable contract has been acted upon by a party who might have avoided it, and who has refrained from doing so in the hope that it may turn out to his advantage, such party cannot then, after abiding the event, or dealing with the subject-matter of the contract, elect to annul the transaction. (u)¹

313. Constructive fraud.—"Trustees, agents, com-

(r) *Clough v. London & North-western Ry. Co.*, 1 L. R., 7 Ex. 26, 35; 41 L. J., Ex. 17.

(s) *Campbell v. Fleming*, 1 Ad. & E. 40.

(t) *Clarke v. Dickson*, Ell. Bl. & Ell. 155; 27 L. J., Q. B. 223. *Mixer's Case*, 4 De G. & J., 575.

(u) *Ormes v. Beadel*, 30 L. J., Ch. 4. *Campbell v. Fleming*, 1 Ad. & E. 40.

¹ *Howard v. Cadwalader*, 5 Blackf. 225; *Barnett v. Stanton*, 2 Ala. 181; *Newell v. Turner*, 9 Porter, 420; *Carter v. Walker*, 2 Rich. 40; *Bacon v. Brown*, 4 Bibb. 91.

missioners, and assignees of bankrupts, solicitors to commissions of bankruptcy, auctioneers, creditors who have been consulted as to the mode of sale, counsel, or any persons who, by being employed or concerned in the affairs of another, have acquired a knowledge of the state of his property, are incapable of entering into any contract for the purchase of such property for themselves, except under certain restrictions and limitations"; (x) and a purchase made under such circumstances will be set aside, even after it has been completed, and a reconveyance will be directed. (y) A trustee or an agent for sale cannot, under ordinary circumstances, become himself the purchaser of the property confided to him to sell. (z) An attorney cannot buy an estate of his client, unless he deals with him "at arm's length," through the intervention of another solicitor, from whom no necessary information is withheld, and who properly discharges his duty; (a) or unless he shows to demonstration that no industry on his part could have got a better bargain; (b) nor can an arbitrator purchase from the parties to the reference, nor a guardian from his ward, nor a trustee from his cestui que trust, unless the surrounding circumstances prove beyond all doubt that the transaction was perfectly fair and advantageous for the client,

(x) *York Buildings Co. v. Mackenzie*, 8 Bro. P. C. 93. *Tate v. Williamson*, L. R., 1 Eq. 528; 2 Ch. 55. *Luff v. Lord*, 34 Beav. 220. *Summers v. Griffiths*, 35 Id. 27. 2 Sugd. Vend. & Pur. 887, ed. 1846. Dig. lib. 18, tit. 1, lex 34, § 7.

(y) *Clark v. Malpas*, 31 L. J., Ch. 696. *Gresley v. Mousley*, 31 L. J., Ch. 537. *Douglass v. Culverwell*, 31 L. J., Ch. 543. *Clanricarde v. Henning*, 30 L. J., Ch. 865; 30 Beav. 175.

Hannah v. Hodgson, Id. 19. 30 L. J., Ch. 738.

(z) *Crowe v. Ballard*, 3 Bro. Ch. C. 119. *Ex parte Lacey*, 6 Ves. 626.

(a) *Gibbs v. Daniel*, 4 Giff. 1.

(b) *Cutts v. Salmon*, 21 L. J., Ch. 750. *Champion v. Rigby*, 1 Russ. & Myl. 539. *Casborne v. Barsham*, 2 Beav. 76. *Hatch v. Hatch*, 9 Ves. 296. *Wright v. Proud*, 13 Id. 138. *Gibson v. Jeyes*, 6 Id. 266. 3 Cujacius, 388. *Gibbes v. Daniel*, 4 Giff. 1.

cestui que trust, or other parties affected by it. (*c*) And although an attorney or agent can show that he is entitled to purchase, yet if, instead of openly purchasing, he purchases in the name of a trustee or agent, without disclosing the fact, such purchase cannot stand. (*d*) If the agent does purchase, the agency is dissolved, he comes forth as a principal, and can claim no commission or remuneration as agent. (*e*)

314. *Duress*.—Any agreement made under improper pressure is voidable. Thus, where B discounted bills to which he had forged his father's signature, and the holders of the forgeries, working on the fears of the father for his son's safety, but without holding out any direct threat, or making any distinct promise not to prosecute, obtained from the father equitable security for the amount of the bills, it was held that the security was void. (*f*) If a man pays money or gives securities to redeem his goods from the custody of the law, that is not a case of duress; nor can he recover back his money, or defend himself from proceedings taken to enforce the securities which he has paid or given under legal compulsion. (*g*) If a person, having been constrained by duress to make a contract, afterwards voluntarily acts upon it, he thereby affirms its validity, and loses the right of avoiding it. (*h*)¹

(*c*) *Cane v. Lord Allen*, 2 Dow, 289.
Dawson v. Massey, 1 Ball & Beat.
 219. *Lord Hardwicke v. Vernon*, 4
 Ves. 411; 14 Id. 504. 2 Sugd. Vend.
 200.

(*d*) *Lewis v. Hillman*, 3 H. L. C. 630.

(*e*) *Salomons v. Pender*, 34 L. J.,
 Ex. 95, 3 H. & C. 639.

(*f*) *Williams v. Bayley*, L. R., 1
 H. L. 200; 35 L. J., Ch. 717.

(*g*) *Liverpool Marine Credit Co. v.*
Hunter, L. R., 3 Ch. 487; 37 L. J.,
 Ch. 386.

(*h*) *Ormes v. Beadel*, 2 De G. F. &
 J. 333; 30 L. J., Ch. 1.

¹ *Knapp v. Hyde*, 60 Barb. 80; *Adams v. Reeves*, 68 N. C.
 134; *Nickodemus v. East Saginaw*, 25 Mich. 456; *Miller v.*
Miller, 68 Pa. St. 486. To render a contract void because of
 threats it must appear that they were of a character to excite the
 reasonable apprehensions of a person of ordinary courage

315. *Mistake.*—Where one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not *ad idem*, and the terms have not been reduced into writing, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. (i) And even if the terms of the contract have been reduced into writing, and there is a latent ambiguity, and the parol evidence adduced to explain it shows that the parties were not of one mind, there is no contract. Thus, if two persons enter into an apparent contract concerning a particular person or ship, and it turns out that there are two persons or ships to which the description in the contract equally applies, and that each of the parties, misled by the similarity, had a different person or ship in his mind, no contract

(i) *Scott v. Littledale*, 8 E. & B. 815; 27 L. J., Q. B. 201.

(*Bailey v. Shanner*, 26 Ark. 280.) Lawful imprisonment is no duress (*Steinbaker v. Wilson*, 1 Pa. Leg. Gazette R. 76). But unlawful or improper imprisonment (*Phelps v. Machlag*, 34 Tex. 371), or menace of unlawful imprisonment might be (*Alexander v. Pierce*, 10 N. H. 494; *Eddy v. Herrin*, 17 Me. 338). Duress through threats of imprisonment is no defense to an action on a promissory note (*Knapp v. Hyde*, 60 Barb. 80). Owners of goods will not invalidate a contract. A threat to withhold payment of a debt, or to refuse performance of a contract, or to do an injury which may be at once redressed by legal process, is not a duress *per minas* (*Miller v. Miller*, 68 Pa. St. 486). Wrongfully taking and keeping goods of a perishable nature (such as oysters), and refusing to surrender them except upon payment of a larger sum than was actually due to the holder, is not duress. *Spaids v. Barrett*, 57 Ill. 289. And also, *Preston v. Boston*, 12 Pick. 7; *Boston & Sandwich Glass Co. v. Boston*, 4 Met. 181. Also *Fulham v. Down*, 6 Esp. 26, n.; *Hills v. Street*, 5 Bing. 37; *Snowden v. Davis*, 1 Taunton, 359.

exists between them. (*k*) Where a contract has been entered into upon the faith of a state of things which does not exist, (*l*) or where the defendant has made a mistake to which the plaintiff has by his acts contributed, even unintentionally, the contract will be rescinded, (*m*) provided the court can replace the parties in their original condition, (*n*) or specific performance will not be enforced. (*o*)¹ Where the terms of the written instrument do not correctly represent the mind of the parties, the court will rectify it, provided the mistake is one of fact, (*p*) and common to both parties. (*q*)²

(*k*) *Raffles v. Wichelhaus*, 2 H. & C. 906; 33 L. J., Ex. 160.

(*l*) *Emmerson's Case*, L. R., 1 Ch. 433; 36 L. J., Ch. 177.

(*m*) *Torrence v. Bolton*, L. R., 14 Eq. 124; 41 L. J., Ch. 643.

(*n*) *Emmerson's Case*, L. R., 1 Ch. 433; 36 L. J., Ch. 177.

(*o*) *Baskcomb v. Beckwith*, L. R., 8 Eq. 100; 38 L. J., Ch. 536.

(*p*) *Powell v. Smith*, L. R., 14 Eq. 85; 41 L. J., Ch. 734.

(*q*) *Harris v. Peppernall*, L. R., 5 Eq. 1.

¹ As to mistake, see *Underhill v. Van Cortlandt*, 2 Johns' Ch. 339; *Boston Water Power Co. v. Gray*, 6 Met. 131. So sureties might be discharged by a mistake of fact (*Morgan's De Colyar on Guaranty, &c.*, p. 445). The rule in the supreme court of the United States, and in the state of New York, appears to be that acts committed under a mistake of fact may be relieved against, but that acts done under a mistake of law, will not be on that account set aside (*Hunt v. Rousmanier's Heirs*, 1 Pet. (U. S.) 1; S. C., 8 Wheat. 174; *Hebborn v. Dunlop*, 1 Id. 179, 195; *Shotwell v. Murray*, 1 Johns. Ch. 512; *Lyon v. Richmond*, 2 Id. 151; *Storrs v. Barker*, 6 Id. 166; *Clark v. Dutcher*, 9 Cow. 670). In Massachusetts the rule appears to be that, if a promise to pay money is made under a mistake of law, the promise cannot be enforced, and if the money be actually paid thereunder, it may be recovered back. *May v. Coffin*, 4 Mass. 342; *Warden v. Tucker*, 7 Id. 452; *Freeman v. Boynton*, Id. 488; *Haven v. Foster*, 9 Pick. 112.

² See as to this, *Gough v. Crane*, 3 Md. Ch. Dec. 135; *Philpott v. Elliott*, 4 Id. 273; *Hall v. Claggett*, 2 Id. 151; *Wood v. Patterson*, 4 Id. 335; *Northrop v. Graves*, 19 Conn. 548; *Culbreath v. Culbreath*, 7 Ga. 64; *McNaughton v. Patridge*,

Where in the making of an agreement between two parties there has been a mutual mistake as to their rights occasioning an injury to one of them, the rule of equity is in favor of interfering to grant relief; and the court will not decline to do so merely because circumstances may have rendered it difficult to restore the parties exactly to their original condition: and, although where the mistake arises from ignorance of a well-known rule of law, the court will not interfere, yet, where it arises upon a construction of a document of doubtful meaning, the doctrine of *ignorantia juris neminem excusat* will not apply, and the court will give relief. (r)¹

Where the mistake is unilateral, and the party by whom it was made is the sufferer, relief will not be granted, unless there has been some undue influence, misrepresentation, surprise, or abuse of confidence. (s)

316. *Failure of consideration.*—When a contract is simply null and void, and not tainted with illegality, money paid by one of the contracting parties to the other may, in general, be recovered back on the ground of a failure of consideration. If a contract is made for the sale and purchase of railway scrip or

(r) *Earl Beauchamp v. Winn*, L. R., 6 H. L. 223, 224.

(s) *Broughton v. Hutt*, 3 De G. & J. 501. *Bentley v. Mackay*, 31 Beav. 143.

11 Ohio, 223; *Ray v. Bank of Kentucky*, 3 B. Mon. 510; *Gratz v. Redd*, 4 Id. 178; *Northrop v. Graves*, 19 Conn. 548; *Bellows v. Stone*, 14 N. H. 201; *Coles v. Bowne*, 10 Paige, 535; *Hunt v. Rousmaniere*, 1 Pet. 15; 8 Wheat. 211; *Hepburn v. Dunlop*, 10 Id. 179, 195; *Shotwell v. Murray*, 1 Johns. Ch. 512, 515; *Lyon v. Richmond*, 2 Id. 51; *Storrs v. Barker*, 6 Id. 169; *Kenyon v. Welty*, 20 Cal. 637; *Millett v. Holt*, 60 Me. 169; *Worthington v. N. Y. Central R. R. Co.*, 6 Lans. 257; *Vernon v. West School District*, 38 Conn. 112; *Lake v. Artisan's Bank*, 3 Abb. N. Y. App. Dec. 10.

¹ Id.

shares, foreign state bonds, railway debentures, or other securities, and the scrip, shares, or bonds turn out to be forgeries, so that the purchaser has never obtained that which he agreed to buy and the vendor to sell, he is entitled to maintain an action for the recovery of his purchase-money, on the ground that there has been a total failure of consideration. (t) Where the defendant sold a bill to the plaintiff, which purported on the face of it to be drawn at Sierra Leone, where no stamp would be required, but the bill turned out to have been drawn in London, and to be of no value for want of a stamp, it was held that the plaintiff was entitled to recover back the money he had paid for the bill, as the bill was not what, upon the face of it, it purported to be, and was not such a bill as the defendant had agreed to sell and the plaintiff to buy. (u)

If a thing does not answer the description of that for which it is sold, the buyer is not bound to take it; and, if he has paid for it, he may recover back the money as upon a failure of consideration. (x)

But the purchaser cannot recover back the price where he has got what he bargained for, although the subject-matter of the sale may subsequently turn out to be a thing of no value. (y) Thus, where the vendor agreed to sell, and the purchaser to buy, scrip certificates of shares in the Kentish Coast Railway, and the certificates were delivered by the vendor, and the purchase-money paid, but the Kentish Coast Railway scheme was subsequently abandoned, and the com-

(t) *Young v. Cole*, 4 Sc. 495; 3 Bing. N. C. 730.

(u) *Gompertz v. Bartlett*, 23 L. J., Q. B. 65; 1 El. & Bl. 849. *Kempson v. Saunders*, 12 Moore, 49; 4 Bing. 17. *Westropp v. Solomon*, 8 C. B. 373; 19 L. J., C. P. 1.

(x) *Blackburn, J., Azemar v. Cassella*, L. R., 2 C. P. 678; 36 L. J., C. P. 263.

(y) *Hall v. Conder*, 26 L. J., C. P. 138.

pany dissolved, and the scrip repudiated on the ground that the secretary had issued it without authority, it was held that the purchaser could not recover from the vendor the money he had paid for it, as he had got what was intended to be bought and sold. (z)

If a man goes into the money market with a bill or note, and gets it discounted without putting his own name on the back of it, he is not bound to refund the money he receives if the bill is dishonored; but if it is not the bill or note of the parties whose names appear upon it, the money received in exchange for it cannot lawfully be retained. Where one man discounted a forged victualing bill, and another a forged navy bill, and another a forged private bill of exchange, it was held that each of the parties was entitled to recover back the money he had paid. (a) But the holder of a bill is entitled to know, on the day it becomes due, whether it is an honored or dishonored bill; and, therefore, notice of the forgery must be given to him on the very day that the payment is made to him, so as to enable him to send notice of the dishonor of the bill to the prior parties on that day. If, therefore, he receives the money, and is permitted to retain it during the whole of that day without any such notice having been given him, the parties who paid him the money cannot recover it back; for, otherwise, they would deprive the holder of his right to proceed against the other parties to the bill. (b)¹

(z) *Lamert v. Heath*, 15 M. & W. 488; 15 L. J., Ex. 297. *Gurney v. Womersley*, 4 Ell. & Bl. 133.

(a) *Jones v. Ryde*, 5 Taunt. 494. *Wilkinson v. Johnston*, 3 B. & C. 428. *Rogers v. Langford*, 1 Cr. & M. 637. (b) *Cocks v. Masterman*, 9 B. & C. 908.

¹ See *Boyd v. Anderson*, 1 Overt. 438; *Murray v. Carret*, 3 Call, 373; *Treat v. Orono*, 26 Me. 217; *Sanford v. Dodd*, 2 Day, 437; *Colville v. Besley*, 2 Denio, 139; *Woodward v.*

The acceptor of a bill of exchange is bound to know the handwriting of the drawer, and cannot recover money which he has paid upon a forged bill accepted by him, and which has gone into the market accredited with his genuine signature. (*c*) It is as much the duty, also, of bankers, to know the handwriting of their customers who draw on them, as it is of an acceptor of a bill to know the drawer's handwriting; and, therefore, if a bill purporting to be drawn by a customer of the banker's is made payable at the bank, and the bankers take up and pay the bill to a bona fide indorsee for value, who presents it to them for payment, they cannot recover the amount from such indorsee. (*d*) But when a banker merely discounts a bill, it is otherwise. (*e*) If a party, whose signature to a bill of exchange has been forged, pays the bill, supposing the signature to be genuine, and so delays the defendant of his remedy against the other parties to the bill, he cannot recover back the money he has paid. (*f*)

317. *Partial failure of consideration.*—The general rule of law is, that, when a contract has been in part performed, no part of the money paid under such contract can be recovered back, (*g*) unless the consideration is clearly severable. (*h*) Where money has been paid as a premium with an apprentice, it is not apportionable, and no part can be recovered back on

(*c*) *Price v. Neal*, 3 Burr, 1357.

(*d*) *Smith v. Mercer*, 6 Taunt. 81.

(*e*) *Fuller v. Smith*, 1 C. & P. 198.

(*f*) *Mather v. Ld. Maidstone*, 18 C. B. 295; 25 L. J., C. P. 311.

(*g*) *Hunt v. Silk*, 5 East, 449.

Blackburn v. Smith, 2 Exch. 783.

Nicholson v. Ricketts, 29 L. J., Q. B. 55.

(*h*) *Astle v. Wright*, 25 L. J. Ch. 864.

Cowing, 13 Mass. 216; *Moses v. Macferlan*, 3 Burr. 1012; *Spring v. Coffin*, 10 Mass. 34; *Lacoste v. Flotard*, 1 Rep. Const. Ct. 467; *Wharton v. O'Hara*, 2 Nott & McC. 65; *Pettibone v. Roberts*, 2 Root, 258.

the ground of failure of consideration by the death of the master. (i) So, where the plaintiff had deposited with the defendant the half of a £50 bank-note, by way of pledge to secure the payment of a debt due from the plaintiff to the defendant, for wines and suppers supplied to the plaintiff by the defendant, in a brothel kept by her, to be there consumed in a debauch, and the plaintiff brought an action to recover the half-note, it was held that, as the plaintiff could not recover without showing the true character of the deposit, and that it was on an illegal consideration to which he was himself a party, he was precluded from obtaining the assistance of the law to recover it back. (k)¹

(i) *Whincup v. Hughes*, L. R., 6 C. P. 78; 40 L. J., C. P. 104.

(k) *Taylor v. Chester*, L. R., 4 Q. B. 309.

¹ See *Charlton v. Lay*, 5 Humph. 496; *Dean v. Mason*, 4 Conn. 428; *Neel v. Deens*, 1 Nott & McC. 210; *Stewart v. Loring*, 5 Allen, 306.

CHAPTER IV.

THE DISCHARGE OF CONTRACTS.

SECTION I.

THE PERFORMANCE OF CONTRACTS.

318. *Mode of performance.*—When the contract is silent as to the mode of performance, it must be performed in accordance with the usage of the place where it is made. (a) The party who is to do the

(a) *Greaves v. Legg*, 11 Exch. 645.

¹ Parsons on Contracts, ii. p. 650, states the rules thus: Generally, if no time or place be specified, the articles are to be delivered where they are at the time of the contract (*Bronson v. Gleason*, 7 Barb. 472; *Barr v. Myers*, 3 Watts & S. 295; *Thaxton v. Edwards*, 1 Stew. 524; *McMurray v. The State*, 6 Ala. 326; *Minor v. Michie*, Walker, 24; *Chambers v. Winn*, Hardin, 80, n.; *Dandridge v. Harris*, 1 Wash. (Va.) 326; *Lobdell v. Hopkins*, 5 Cowen, 518; *Vance v. Bloomer*, 20 Wend. 196; *Rice v. Churchill*, 2 Denio, 145), unless collateral circumstances designate a different place (*Bronson v. Gleason*, 7 Barb. 472). If the time be fixed, but not the place, then it will be presumed that the deliverer was to bring the articles to the receiver at that time, and for that purpose he must, as a rule, go with the chattels to the residence of the receiver. If no place is dedicated, and the deliverer is not in fault in this, he may deliver the chattels to the receiver, in person, at any place which is reasonably convenient. And if the deliverer be under an obligation to seek or notify the receiver, he need not follow him out of the state for this pur-

act may accomplish it in any manner that is most convenient and least burdensome to himself; (*b*) but the performance must be a substantial, bona fide performance, in accordance with the true meaning of the parties, and not a mere compliance with the letter of the engagement, in violation of the spirit of the compact. If a man enters into an engagement to deliver up a bond or lease, he does not fulfill his contract by returning it canceled, or with the seal torn off. (*c*) If payment is to be made, it must be a true and effectual payment to the right party. If something is to be done according to the advice and direction of a third party, the party bound to do the act must procure the necessary advice and direction. If the concurrence of a stranger is essential, he must procure such concurrence. If he is to deliver corn on board a ship at such a port on such a day, he must go in quest

(*b*) *Reade v. Meniaeff*, 7 C. B. 162. (*c*) *Richardson v. Barnes*, 4 Exch. 128.

pose, for he is only bound to reasonable diligence and efforts. And if the receiver refuses or neglects to appoint a place, or purposely avoids receiving notice of a place, the deliverer may appoint any place, with a reasonable regard to the convenience of the other party, and there deliver the articles. But though he is not obliged to follow the receiver out of the state, yet if the receiver live out of the state, or even out of the United States, this perhaps does not exempt him from the obligation of inquiring from him where the chattels shall be delivered, *Roberts v. Beatty*, 2 Penn. 63; *Aldrich v. Albee*, 1 Greenl. 120; *Peck v. Hubbard*, 11 Vt. 612; *Bassett v. Kerne*, 1 Leon. 69; *Taylor v. Gallup*, 8 Vt. 340; *Townsend v. Wells*, 3 Day, 327; *Russell v. Ormsbee*, 10 Id. 274; *Livingston v. Miller*, 1 Kern. 80; *Gilbert v. Danforth*, 2 Seld. 585; *Barr v. Myers*, 3 Watts & S. 295; *Howard v. Miner*, 20 Me. 325; *Bixby v. Whitney*, 5 Greenl. 192; *Bean v. Simpson*, 16 Me. 49; *Minigus v. Pritchett*, 3 Dev. 78; *Roberts v. Beatty*, 2 Penn. 63; *Aldrich v. Albee*, 1 Greenl. 120; *Smith v. Smith*, 25 Wend. 405; 2 Hill, 351.

of the ship, and must not wait for notice that the ship is ready. If he is bound to repair a house on timber being found him by the landlord, he must go and seek the timber and say what he wants, and not wait for the timber to come to him. (*d*) If the condition of a bond be to deliver twenty quarters of wheat or twenty loads of timber, the obligor is not bound to carry the same about and seek the obligee, but the obligor, before the day, must go to the obligee, and know where he will appoint to receive it, and there it must be delivered; and "so note a diversity between money and things ponderous or of great weight." (*e*) If, in an agreement for the sale and purchase of realty, the vendor engages that certain named parties shall join in a conveyance, this sometimes amounts to a warranty that they are in a position to join with effect. It is not sufficient for them to join as trustees, if their doing so will have the effect of involving the purchaser in an action. (*f*) If a lessee covenants to insure in the joint names of himself and the lessor, and insures in the name of the lessor only, the covenant is nevertheless well performed; but, if he has covenanted to insure in the sole name of the lessor, and then effects an insurance in the joint names of himself and the lessor, there is no performance of the covenant. (*g*) A covenant to keep a ship insured is broken if the ship is actually uninsured, although for three days only, and although the usual slip for the insurance has been delivered by the underwriters, and a policy is afterwards executed in accord-

(*d*) Com. Dig. CONDITION, G. L.

(*e*) Co. Litt. 210 b. Bac. Abr. AGREEMENTS, B. 3.

(*f*) *Mosley v. Hide*, 20 L. J., Q. B. 539.

(*g*) *Havens v. Middleton*, 22 L. J., Ch. 746.

SECT. I.] PERFORMANCE OF CONTRACTS.

ance therewith. (*h*) A covenant not to sell farm-yard manure off the premises is broken by selling any off, although the covenantor brings back more manure, and of better quality, than that carried off. (*i*) A contract to deliver coals of a certain description is not performed by delivering some of that description and some of an inferior quality mixed together. (*k*)¹

319. *Cumulative and alternative stipulations.*—

If a party engages to do two things, the one is cumulative upon the other, and he must perform both the things agreed to be done; but, if the contract is in the alternative for the performance of one or the other of two different acts, the liability is discharged by the performance of one of the acts. (*l*) Under an agreement to perform one of two things, the right of election is in the party who is to do either one or other of the two things. (*m*) “If a man granteth a rent of 20s. or a robe to one of his heirs, the grantor shall have the election; for he is the first agent by payment of the one or delivery of the other. So, if a man maketh a lease rendering a rent or a robe, the lessee shall have the election.” If the owner of a wood licenses another to cut down and carry away twenty loads of hazel, or twenty loads of maple, to be taken in his wood, there the licensee shall have the election, as he is to do the first act, viz., to fell and to carry away. (*n*) If a vendor of corn agrees to deliver to

(*h*) *Parry v. Great Ship Co.*, 4 B. & S. 556; 33 L. J., Q. B. 41.

(*i*) *Leigh v. Lillie*, 6 H. & N. 165; 30 L. J., Ex. 25.

(*k*) *Nicholson v. Bradfield Union, L. R.*, 1 Q. B. 620; 35 L. J., Q. B. 176; 7 B. & S. 747. *Josling v. Kings-*

ford, 13 C. B. N. S. 447; 32 L. J., C. P. 94.

(*l*) *Great Northern Rail. Co. v. Kennedy*, 4 Exch. 425; 19 L. J., Ex. 11.

(*m*) *Layton v. Pearce*, 1 Doug. 16.

(*n*) *Co. Litt.* 145 a.

See *Barney v. Bliss*, 1 D. Chip. (Vt.) 399; *Barns v. Gra-Cowen*, 452.

the purchaser 50 or 100 quarters of corn by a day named, at so much a quarter, and the purchaser agrees to pay the price on the corn being delivered to him, the vendor will have to do the first act, and will have his election to deliver, and demand payment for either the 50 or the 100 quarters. (*o*) If one party has bound himself to do one of two things at the choice of the other, he must, in pleading the performance of his engagement, show that he was ready and offered to do either of them. Therefore, if he is to deliver £20 or ten kine at the option of the other party, he does not perform his contract by tendering the kine without the money. (*p*) Where a party has his election of doing one of two things, and makes his election, he is bound by it. (*q*) Thus, where a man has got the right to elect whether he will avail himself of a forfeiture and avoid a lease or other contract, and once makes his election, he makes it forever. (*r*) So, if a purchaser, on the delivery of goods, has a right to elect whether he will pay by bill or cash, and fails to give the bill, he will be deemed to have made his election to pay cash, and cannot afterwards revoke it. (*s*)¹

320. Time of performance.—Where no time is fixed for the performance of the contract, it must be performed within a reasonable time, according to the

(*o*) Penny v. Porter, 2 East, 2. El. 853. Gath v. Lees, 3 H. & C. Chippendale v. Thurston, 4 C. & 558.

P. 98.

(*r*) Ward v. Day, 33 L. J., Q. B.,

(*p*) Fordley's Case, 1 Leon. 68.

13; 5 B. & S. 359.

(*q*) Co. Litt. 146. Brown v. Royal

(*s*) Rugg v. Weir, 16 C. B. N. S.

Ins. Soc., 28 L. J., Q. B. 278; 1 El. & 477.

¹ Where the contract is in the alternative with the election to either party, or as to the presumption of election, see Smith v. Senborn, 11 Johns. 59; Small v. Quincy, 4 Greenl. 479; McNitt v. Clark, 7 Johns. 465; Coice v. Moseley, 1 Bailey, 136; Norton v. Webb, 36 Me. 270; Disborough v. Neilson, 3 Johns. Cas. 81.

circumstances. (t)¹ A contract to do a particular thing "directly," or "as soon as possible," or "forthwith," does not mean that it is to be done instantly; but there must be no delay in performance; and such a contract requires a much more speedy fulfillment than a contract to do a thing within a reasonable time. (u) When a party covenants to pay money "immediately on demand," the word "immediately" must receive a reasonable construction, so as to allow the debtor time to procure the money; and, if the demand is not made by the creditor himself, to inquire into the authority of the person making it. (x) In

(t) Rolfe, B., *Startup v. Macdonald*, 6 M. & G. 593, 610. *Hales v. London & N. W. Ry. Co.*, 4 B. & S. 66; 32 L. J., Q. B. 292. *Taylor v. Great Northern Ry. Co.*, L. R., 1 C. P. 385; 35 L. J., C. P. 210.

(u) *Duncan v. Topham*, 8 C. B. 225. *Attwood v. Emery*, 1 C. B. N. S. 110; 26 L. J., C. P. 73. *Toms v. Wilson*, 4 B. & S. 442; 32 L. J., Q. B. 382.

Roberts v. Brett, 20 C. B. N. S. 148; 34 L. J., C. P. 241. *Brighty v. Norton*, 3 B. & S. 305; 32 L. J., Q. B. 38.

(x) *Toms v. Wilson*, 4 B. & S. 442, 33 L. J., Q. B. 382. *Brighty v. Norton*, 3 B. & S. 305; 32 L. J., Q. B. 38. *Massey v. Sladen*, L. R., 4 Ex. 13; 38 L. J., Ex. 34.

¹ *Sansom v. Rhodes*, 8 Scott, 544; *Bailey v. Simonds*, 6 N. H. 159; *Russell v. Ormsbee*, Id.; *Bigelow v. Wilson*, 1 Pick. 485; *Phelan v. Douglass*, 11 How. Pr. 193; *Howe v. Huntington*, 15 Me. 350; *Clark v. Remington*, 11 Metc. 361; *Craft v. Isham*, 13 Conn. 28; *Thomas v. Davis*, 14 Pick. 353; *Talbot v. Gray*, 18 Id. 584; *Atwood v. Cobb*, 16 Id. 227; *Roberts v. Beatty*, 2 Penn. 63; *Philips v. Morrison*, 3 Bibb. 105; *Cocker v. Franklin Man. Co.*, 3 Sumner, 530; *Atkinson v. Brown*, 20 Me. 67; and see *ante*, p. 535, n.; *Davis v. Talcot*, 2 Kern. 184; *Ellis v. Paige*, 1 Pick. 43; *Porter v. Blood*, 5 Id. 54; *Atwood v. Clark*, 2 Greenl. 249; see also, *Murray v. Smith*, 1 Hawks, 41; *Kingsley v. Wallis*, 14 Me. 57. If the question of time depends upon controverted facts, or where the motives of the party enter into the question, it has been said that the whole must necessarily be submitted to a jury. *Hill v. Hobart*, 16 Me. 164; *Greene v. Dingley*, 24 Id. 131; see also, *Cocker v. Franklin M'f'g. Co.* 3 Sumner, 530; *Howe v. Huntington*, 15 Me. 350.

the case of a covenant to pay rates, the payment must be made within a reasonable time after the rate is made, and public notice given thereof on the church door. It is not necessary to give the covenantor notice to pay, or to make any personal demand upon him, it being his duty to seek out the proper parties to whom the rates are to be paid. (y) Where a railway company had contracted with the plaintiff for the supply of 350,000 railway sleepers within a certain limited period, to be delivered from time to time in such quantities as should be required, it was held that the company was bound to give the orders, and take the whole quantity, within the specified period. (z) Whenever time has not been made of the essence of the contract, and either party is guilty of delay, a notice in writing by the other to the effect that he shall consider the contract at an end if it be not completed within a named period (the same being a reasonable time for its completion), will be binding on the party to whom it is given. (a) A person who has covenanted to do a particular act, impliedly covenants to do nothing which must necessarily have the effect of preventing him from performing his covenant. (b) And, where a party has covenanted to do a particular act, and has deprived himself of the power of performance, he may be sued for damages before the expiration of the time limited for performance. (c) By the Bank Holidays Act, 1871, (d) no

(y) *Davis v. Burrell*, 10 C. B. 821.

(z) *Gt. Northern Ry. Co. v. Harrison*, 12 C. B. 576; 22 L. J., C. P. 49.

(a) *Reynolds v. Nelson*, 6 Mad. 26. *Sugd. Vend.* 306, 307.

(b) *Stirling v. Maitland*, 34 L. J., Q. B. 3; 5 B. & S. 840.

(c) *Lovelock v. Franklyn*, 3 Q. B.

378. *Short v. Stone*, Id. 369. *Ford v. Tiley*, 6 B. & C. 325. *Bowdell v. Parsons*, 10 East, 359. *Wild v. Harris*, 7 C. B. 1004. *Danube & Black Sea Ry. Co. v. Xenos*, 11 C. B., N. S. 152; 13 Id. 825; 31 L. J., C. P. 84, 284.

(d) 34 Vict. c. 17, s. 3.

person can be compelled to do any act, upon the bank holidays thereby established, which he would not be compelled to do on Christmas Day or Good Friday ; and the obligation to do such act is postponed to the day following such bank holiday.

321. *Conditions precedent to performance.*—Sometimes the performance of a contract by one party depends on something to be previously done by the other ; and, when that is the case, an action will not lie for non-performance, if default has been made in the accomplishment of the precedent act ; for, if you desire to perform a contract, you must first put yourself right by performing your part of the contract, or being ready and willing to do so. (e) Where shares are sold upon the faith of an undertaking by the vendors to take them back at the expiration of six months from the date of the sale if the shares do not in the meantime rise in the market, a tender of the shares, by the purchaser to the vendor, is a precedent act, to be performed by the purchaser, before there can be any default on the part of the vendor, or any breach of his undertaking. (f) “Where mutual covenants,” observes Lord Mansfield, “go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other ; but where the covenants go only to a part, and where a recompense may be had in damages, there the defendant has a remedy upon his covenant, and shall not plead it as a condition precedent.” Thus, where the plaintiff, in consideration of £500 and an annuity, conveyed to the defendant a plantation, together with

(e) *French v. Campbell*, 2 H. Bl. 178. *Duke of Marlborough v. Osborn*, 33 L. J., Q. B. 148 ; 5 B. & S. 67. *Lancashire v. Skillingworth*, 1 Raym. 686. *Jones v. Barkley*, 2 Doug. 684. *Startup v. Macdonald*, 7 Sc. N. R. 297 ; 12 L. J., Ex. 483.

(f) *Blackwell v. Nash*, 1 Str. 535.

the stock of negroes upon it, and covenanted that he had a good title to the plantation and negroes, and the defendant covenanted for payment of the annuity, and the plaintiff brought his action for the breach of this covenant, and the defendant pleaded that the plaintiff was not legally possessed of the negroes, it was held that, as the breach went only to a part of the consideration, and might be paid for in damages, the defendant should not rely on the performance of the entire covenant as a condition precedent; Lord Mansfield observing that, if the plea was to be allowed, any one negro not being the property of the plaintiff would bar the action. (*g*) And where a plaintiff covenanted to take out 280 passengers to Jamaica, and the defendant covenanted to have them ready for shipment, and to pay £5 a man for their conveyance, and the plaintiff only took and carried 180 of them, it was held that the contract was divisible, and that the plaintiff was entitled to maintain an action in respect of his partial performance of the contract. (*h*) Where a covenant for the performance of various acts and duties by one party constitutes the consideration for a subsequent covenant by another party, it is not, in all cases, essential that there should be an exact performance of the precedent covenant, in every minute particular, in order to create a liability upon the subsequent covenant. (*i*) The time appointed for the performance of some precedent act or condition is sometimes of the very essence of the contract; so that,

(*g*) *Boone v. Eyre*, 1 H. Bl. 273 (n).
Le Blanc, J., Glazebrook v. Woodrow, 8 T. R. 375. *Franklyn v. Miller*, 4 Ad. & E. 605. *Newson v. Smythies*, 3 H. & N. 840; 28 L. J., Ex. 97. *London Gas Co. v. Chelsea Vestry*, 8 C. B., N. S. 215. *East Co. Rail. Co. v. Philipson*, 16 C. B. 12.

(*h*) *Tomson v. Noel*, 1 Lev. 16; 1 Keb. 100.

(*i*) *Campbell v. Jones*, 6 T. R. 573. *Glazebrook v. Woodrow*, 8 T. R. 375. *Carpenter v. Creswell*, 1 M. & P. 77. *Starers v. Curling*, 3 Sc. 747; 3 Bing. N. C. 355.

if the party who was to do the act, fails in performance at the time specified, he is liable in damages to the party in whose favor the act was to be done, and the latter is enabled to decline all further performance of the contract, (*k*) unless the condition or precedent act has been waived by acceptance of part performance, so as to render it a mere collateral stipulation. (*l*) When one thing only is to be done, by a day named, it depends on the course of trade, and the intention of the parties, whether the time appointed for the doing of the act is of the essence of the contract or not; but when the contract is for the performance of several acts and duties, at different periods of time, the performance of any particular act, at the exact period specified, will not be a condition precedent to the right of action upon the contract, unless the neglect has had the effect of precluding the defendant from deriving any benefit or advantage from the contract. (*m*)

322. Demand of performance, when necessary.—Where a penalty or forfeiture attaches for non-payment of money, or for non-performance of a particular act after demand, demand of performance is a condition precedent to a right of action for the penalty or the forfeiture; (*n*) and personal demand is, in these cases, generally necessary, so that demand made upon the wife or servant of the party in his absence, though made at his dwelling-house, is insufficient. (*o*) Where, by the express terms of a contract, the duty to pay money or to render some particular service is not to

(*k*) *Tidey v. Mollett*, *ante*, p. 163.
Hoare v. Rennie, 5 H. & N. 19; 29 L. J., Ex. 73.

(*l*) *Behn v. Burness*, *ante*, p. 351.

(*m*) *Payne v. Banner*, 15 L. J., Ch. 227.

(*n*) *Carter v. Ring*, 3 Campb. 460.
Fitz-Hugh v. Dennington, 6 Mod. 227, 259. *Toms v. Wilson*, 4 B. & S. 442, 32 L. J., Q. B. 33, 382.

(*o*) See, as to license to distrain after demand, *Belding v. Read*, 3 H. & C. 955; 34 J. L., 212.

arise until after demand has been made, there is no cause of action until demand has been made. Thus where a man covenants or agrees to pay the debt of some third party on demand, or to deliver up a bond to be canceled on request, there the demand or request is a condition precedent to the existence of any cause of action. (*p*) So, when a promissory note is made for the payment of a certain sum of money within a certain limited time after demand, there is no debt or duty or cause of action, until demand has been made, and the time limited has elapsed. (*q*) Where, however, there is a debt due, and a covenant or promise by the debtor to pay the debt on request, no request need be made; for the law casts upon the debtor the duty of seeking out his creditor, whilst he remains within the realm of England, (*r*) and paying the money without any request. (*s*) A plea, therefore, that he has not been requested to pay the money, is a nullity. (*t*) And where the bond, covenant, or promise is for the payment of money generally, the duty to pay arises as soon as the contract is made, and may be at once enforced by action. When the instrument provides for payment by a day named, there is no debt due, or cause of action, until the day arrives; and then the issue of a writ is the only demand that need be made; (*u*) and wherever a debt accrues, or a duty

(*p*) *Sicklemore v. Thistleton*, 6 M. & S. 9. *Topham v. Braddick*, 1 Taunt. 573. *Simpson v. Routh*, 2 B. & C. 682. *Bach v. Owen*, 5 T. R. 409. *Bowdell v. Parsons*, 10 East, 360. *Peck v. Methold*, 3 Bulstr. 297. *Webb v. Martin*, 1 Lev. 48.

(*q*) *Thorpe v. Booth*, R. & M. 388. *Holmes v. Kerrison*, 2 Taunt. 323.

(*r*) Co. Litt. 210 b. Where the debt is payable abroad, the debtor

must seek his creditor abroad. *Fessard v. Mugnier*, 18 C. B., N. S. 286; 34 L. J., C. P. 126.

(*s*) *Collins v. Benning*, 12 Mod. 444. *Wallis v. Scott*, 1 Str. 88. *Master Butchers, &c. Co. v. Bullock*, 3 B. & P. 434.

(*t*) *Capp v. Lancaster*, Cro. Eliz. 548. *Thomson v. Butler*, Id. 727. *Rumball v. Ball*, 10 Mod. 38.

(*u*) *Gibbs v. Southam*, 5 B. & Ad. 97. *Frampton v. Coulson*, 1 Wils.

to pay arises, on the performance of certain stipulated acts by the plaintiff; and the precedent acts are done, the duty of performance on the part of the defendant arises without any request on the part of the plaintiff.

(*x*) In the case of a mortgage of chattels by a bill of sale containing a condition that, if the mortgagor do not immediately, upon demand in writing being delivered to him, pay the mortgage-money and interest, it shall be lawful for the mortgagee to take possession of and sell the subject-matter of the mortgage, the mortgagor has a reasonable time, after the demand has been made, to procure the money, and to inquire into the authority of the person making the demand to receive the money. (*y*)

323. *Waiver of demand of performance.*—When a request or demand of performance is, by the contract, made a condition precedent to any liability for non-performance, if the party who is to do the act has disabled himself from performance, the stipulation as to the request is dispensed with. (*z*)¹

324. *Dispensation of performance of conditions precedent.*—That which is a condition precedent to the liability upon a covenant or promise, when the contract is made, may cease to be so by the subsequent conduct of the covenantor or promisor in treating the contract as a continuing contract, and taking the benefit of a part performance of it, after the expiration of the time appointed for the fulfillment of the condition. (*a*) A man may always dispense with the performance of a condition in his own favor; and

33. *Absalom v. Gething*, 32 Beav. 322; 32 L. J., Ch. 786.

(*x*) *Spaeth v. Hare*, 9 M. & W. 326.

(*y*) *Toms v. Wilson*, 4 B. & S. 442; 39 L. J., Q. B. 33, 382.

(*z*) *Bowdell v. Parsons*, 10 East, 361.

(*a*) *Newson v. Smythies*, 3 H. & N. 840; 28 L. J., Ex. 97. *White v. Beeton*, 30 Id. 376; 7 H. & N. 42.

¹ And so as to notice. 2 *Parsons on Contracts*, 668.

if there are several precedent or contemporaneous acts to be performed, and the one party discharges the other from the performance of some of them, it is the same thing as if the things dispensed with had been done. (*b*) Thus, if a vendor is to make out a good title to an estate, and a purchaser is to prepare and tender a conveyance to the vendor, and the latter is then to execute it, and the purchaser discharges the vendor from the duty of executing the conveyance, it is the same as if the vendor had actually executed it. (*c*) Every contract is, as we have seen, to be interpreted in connection with the surrounding circumstances; and the acts done by the contracting parties in fulfillment of the contract may be regarded, in order to see what interpretation they have themselves put upon it, and what conditions have been waived or performed; and the construction of the instrument may thus be varied by matter *ex post facto*. (*d*) Where an incoming tenant, on taking possession of a farm, agreed to pay the outgoing tenant for the hay and straw a fair price, to be ascertained and settled by valuers appointed on both sides, and valuers were appointed who were unable to agree, and in the meantime the incoming tenant consumed all the hay and straw, it was held that he had dispensed with the valuation by two valuers, and must pay for the hay and straw whatever a jury might consider to be a "fair price." (*e*) Where the plaintiffs agreed to sell and the defendants to buy certain casks of butter, to be shipped in October, and the butter was not

(*b*) *Jones v. Barkley*, 2 Doug. 684.
As to when the dispensation must be by deed, see *Thames Iron, &c. Co. v. Roy. Mail St. P. Co.* 31 L. J., C. P. 169.

(*c*) *Laird v. Pim*, 7 M. & W. 485.

Guardians of East London Union v. Metropolitan Ry. Co., L. R., 4 Ex. 309; 38 L. J., Ex. 225.

(*d*) *Pust v. Dowie*, *ante*, p. 351.

(*e*) *Clarke v. Westrope*, 18 C. B. 784; 25 L. J., C. P. 287.

shipped until November, and, that fact being communicated to the defendants, they at first demurred, but afterwards assented, and received and retained the invoice and bill of lading, which was indorsed to them, and after that the vessel with the butter on board went ashore, and part of the butter was lost and the remainder damaged, and the defendants then repudiated the contract, contending that the condition, that the butters should be shipped in the month of October, had not been performed, it was held that the assent of the defendants to the shipment in November, and the acceptance by them of the indorsed bill of lading, amounted to a waiver of the precedent condition; and, the condition being waived, it was the same as if it had never been inserted in the contract at all. (*f*) In certain cases, where a party intends to waive a condition in his favor, and to hold the other the party liable notwithstanding the non-performance of condition, he is bound to give notice of his intention. (*g*)

325. *Tender of performance.*—If the act covenanted or agreed to be done by one party, cannot be completed without the concurrence of the party for whom it is to be done, the former must do all that he can do without such concurrence to complete the act; and, if he does this, he does what is equivalent in law to actual performance. (*h*) When goods are to be delivered, the tender must be made under such circumstances that the party to whom it has been made has had a reasonable opportunity of examining the goods, in order to ascertain that the thing tendered was what it purported to be. (*i*) If a vendor is ready and

(*f*) *Alexander v. Gardner*, 1 Sc. 640. *Wing v. Harvey*, 32 L. J., Ch. 511.

(*h*) *Hall v. Conder*, 26 L. J., C. P. 288.

(*i*) *Startup v. Macdonald*, 7 Sc. N. R. 297; 12 L. J., Ex. 483.

(*g*) *Morten v. Marshall*, 33 L. J., Ex. 54; 2 H. & C. 305.

Isherwood v. Whitmore, 1 M. & W. 350.

offers to deliver at the place appointed by the contract, and the purchaser insists upon a delivery at an other and different place, this, if persisted in, is a refusal to accept according to the contract. (*k*)¹

326. Prevention of performance.—It is a principle of law, that he who prevents a thing from being done, shall not avail himself of the non-performance which he has himself occasioned. Where, therefore, it was covenanted between the plaintiff and the defendant that the plaintiff should execute and deliver an assignment and general release to the defendant, and the plaintiff offered to assign, and execute and deliver the release, and tendered a draft for the defendant's perusal, but the defendant refused to look at it, and said he would have nothing to do with it, it was held that the defendant had discharged the plaintiff from doing anything further. "The party," observes Lord Mansfield, "who is to do the act must show that he was ready and willing to do it; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go further and do a nugatory act." (*l*) If a man has covenanted to build a house on the land of the covenantee, performance of the covenant is excused if the covenantee will not suffer the covenantor to come upon the land

(*k*) *Lancashire v. Killingworth*, 1 &c., 17 Q. B. 148; 20 L. J., Q. B. Raym. 686. *Ripley v. McClure*, 466.
ante, p. 352. *Cort v. Ambergate*, (*l*) *Jones v. Barkley*, 2 Doug. 694.

¹ As to tender of chattels, see *Veazu v. Harmony*, 7 Greenl. 91; *Wyman v. Winslow*, 2 Fairf. 398; *Leballister v. Nash*, 24 Me. 316; *Bates v. Churchill*, 32 Id. 31; *Bates v. Bates*, Walker, 401; *Newton v. Galbraith*, 5 Johns. 119; *Robbins v. Luce*, 4 Mass. 474; *Robinson v. Batchelder*, 4 N. H. 40; *Brown v. Berry*, 74 Id. 459; *McConnel v. Hall*, Brayt. (Vt.) 223; *Downer v. Sinclair*, 15 Vt. 495, *Mattison v. Westcott*, 13 Id. 457; *Gilman v. Moore*, 14 Id. 457; *Samary v. Goe*, 3 Wash. C. C. 140.

to build, as he cannot lawfully come there without the permission of the covenantee. (m) So, if a man has covenanted with me to collect my rents in such a hamlet, and I interrupt him in collecting them, this excuses him from the performance of his covenant. (n) If the presence of the plaintiff was essential to the performance of the act, and the plaintiff, by his absence, has prevented performance, he has no ground of action for non-performance; for, "whenever the plaintiff himself has occasioned the breach of contract, that is an answer to the complaint founded on that breach, not on the ground of an agreement, but because the act complained of was the act of the plaintiff himself, and not, as charged, the act of the defendant. The defendant may say, 'This is your own act; and therefore you are not damnified.'" (o) Where the lessee of a house covenanted to repair it, and some sparks of fire from the lessor's adjoining chimney fell on the house and burnt it, it was held that the lessee was not liable upon his covenant to repair the damage, the fire having been caused by the lessor himself. (p) If the obligee of a bond has himself prevented the obligor from fulfilling the condition of the bond, he shall never take advantage of the non-performance of the condition; for that would be enabling him to benefit by his own wrong. Therefore, if the condition of a bond be that the son of the obligor shall serve the obligee for a term of years, and the obligor tenders his son, and the obligee refuses to receive him, or takes him, and within the

(m) 1 Rolle Abr. *CONDITION*, N. pl. 3, p. 453.

(n) Id. p. 454, pl. 7. *Doe v. Sutton*, J. C. & P. 706. *Inchbald v. Western Neilgherry Co.*, 17 C. B., N. S. 733; 34 L. J. C. P. 15.

(o) Tindal, C. J., *West v. Blakeway*, 2 M. & Gr. 751. *Com. Dig. CONDITION*, L. 5.

(p) 1 Rolle Abr. p. 454, *CONDITION*, N. pl. 8.

term commands him to go away, the condition will be deemed to have been fulfilled, and the bond will not be forfeited. (q) So, if the condition be to build or repair a house, and the obligee, or another by his order, prevents the obligor from coming upon the land to build or repair it, says that it shall not be built, or interrupts the building or repairing, performance of the condition is excused, and the bond discharged. (r)¹ Where one of the two contracting parties so conducts himself as to subject the other to an action at the suit of some third person if he duly performs the contract, the non-performance is excused. (s)

327. *Impossibility of performance* is, in general, no answer to an action for damages for non-performance. If the thing to be done is notoriously physically impossible, and was known to be so by both parties at the time of the making of the contract, the contract will be a void contract; unless the promisor has taken upon himself to warrant that it is possible. (t) If a married man exchanges mutual promises of marriage with a single woman, it is no answer to an action by the latter to recover damages for non-performance, to set up the illegality of a second marriage unless the fact of the existing marriage of the promisor was known to the woman at the time of the making of the contract, in which case it would be an illegal and

(q) 1 Rolle Abr. 455, CONDITION, P. pl. 1; Q. pl. 1. *Hayward v. Bennett*, 3 C. B. 423. *Holme v. Guppy*, 3 M. & W. 389.

(r) 1 Rolle Abr. 453, CONDITION, N.

(s) *European & Australian Royal Mail Co. v. Royal Mail Steam Packet Co.*, 30 L. J., C. P. 247.

(t) Per Willes, J., *Clifford v. Watts*, L. R., 5 C. P. 577, 585; 40 L. J., C. P. 36. *Hills v. Sughrue*, 15 M. & W. 253. *Roberts v. Bury Commissioners*, L. R., 5 C. P. 325; 39 L. J., C. P. 129. *Jones v. St. John's College, L.* R., 6 Q. B. 124; 40 L. J., Q. B. 8c.

¹ See *Niblo v. Binsse*, 3 Abb. (N. Y.) App. Dec. 375.

void contract. (u) If the thing to be done was possible, at the time of the making of the contract, but has become impossible since, the promisor is liable to an action for damages for non-performance, if he has either expressly or impliedly undertaken, without any qualification, to do it. Where the impossibility of performance has been occasioned by the act of a stranger, or by the act of the defendant himself, it constitutes no defense to an action. (v) Where the charterer of a ship had covenanted to send a cargo alongside at a foreign port, but, in consequence of the prevalence of an infectious disorder at the port, all public intercourse was prohibited by the authorities of the place, he was held to be responsible in damages for the non-performance of his covenant. (x) So, where the defendant, in an action for rent, sought to excuse himself by reason of his having been expelled from the premises by alien enemies, his plea was held insufficient. (y) It was there resolved that, "where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him"; but "where the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; and, therefore, if the lessee covenant to repair a house, though it be burnt by lightning or thrown down by enemies he ought to repair it." This has sometimes been construed to mean that the promisor is answerable in damages

(u) *Wild v. Harris*, 7 C. B. 1005; 18 L. J., C. P. 297. *Millward v. Littlewood*, 20 Id. Ex. 2.

(v) Bro. Abr. *CONDITION*, pl. 127. *Holt*, C. J., *Thornborow v. Whitacre*,

2 Raym. 1164. *Hochster v. De la Tour*, 2 El. & Bl. 688.

(x) *Barker v. Hodgson*, 3 M. & S. 267.

(y) *Paradin v. Jane Aleyn*, 26.

where the performance of his promise has become impossible by the act of God, and sometimes that he is answerable where performance has become, not impossible, but only more burdensome. Where, in an action for breach of promise of marriage, the defendant pleaded that consummation had become impossible without danger to his life, it was held to be no answer to the action. (z) But where, after the making of the contract, performance has become impossible by the act of God, it would seem that the promisor is excused unless it clearly appears, from the terms of the contract, that the promisor was intended to be liable in all events. Where a man, upon the marriage of his daughter, covenanted with her intended husband to give and bequeath unto her, by deed or will, an equal share with his other children of the property he should die possessed of, and the daughter died in the lifetime of the covenantor, it was held that the liability upon this covenant was discharged by the death of the daughter, as performance had then become impossible by the act of God. (a) And where the occupier of a music-hall agreed with the plaintiff that the plaintiff should have the use of the hall on certain days for the purpose of giving concerts therein, and the plaintiff agreed to pay a certain sum per diem for the use of the hall, and before the first of the appointed days the hall was consumed by fire, it was held that both parties were discharged from the contract. (b) Where the plaintiffs contracted with the defendant to erect certain machinery upon his buildings and premises in his own occupation, for a specified sum, and to keep the whole in order, under fair wear

(s) *Hall v. Wright*, El. Bl. & El. Hare, 267. But see *In re Brookman's Trusts*, 38 L. J., Ch. 585.

(a) *Jones v. How*, 9 C. B. 19; 7 (b) *Taylor v. Caldwell*, 3 B. & S. 837; 33 L. J., Q. B. 164.

and tear, for two years; and, when the machinery was only partly erected, a fire accidentally broke out in the buildings, and without any fault by either party, destroyed both the buildings and the machinery then erected thereon—it was held that both parties were excused from the further performance of the contract, but that the plaintiffs were not entitled to recover anything in respect of any portion of the machinery which had been erected and destroyed, as the whole work contracted to be done by them had not been completed. (c) It has even been held that incapacity, by reason of the intervention of an act of God, to perform personal service, is an excuse for its non-performance, notwithstanding a covenant to serve, absolute and unconditional in its terms, on the ground that the parties, at the time of entering into the covenant, must be supposed to have contemplated the continuance of the covenantor's ability to perform the service as one of the conditions of the contract. (d) It has been said that it is an inaccurate expression to say that the act of God excuses the breach of the contract, and that what is meant, is, that the breach is not within the contract. (e) If a man has covenanted or agreed to do one of two things, and the performance of one of them is rendered impossible, he is not discharged from his liability to do the other. (f) A covenant, in a lease of a coal mine or salt mine, to raise and work so many tons of coal or salt a year, or to pay a certain minimum rent, is not discharged by proof that the mine is exhausted, and that there are

(c) *Appleby v. Meyers*, L. R., 2 C. P. 651; 36 L. J., C. P. 331.

(d) *Boast v. Firth*, L. R., 4 C. P. 1; 38 L. J., C. P. 1; and see *Robinson v. Davidson*, L. R., 6 Ev. 269; 40 L. J., Ex. 172.

(e) *Hannen, J., Baily v. De Crespigny*, L. R., 4 Q. B. 185; 38 L. J., Q. B. 98.

(f) *Barkworth v. Young*, 4 Drew, 24; 26 L. J., Ch. 153.

no more coals or salt to work. (*g*) But performance is excused where it has been rendered impossible by act and operation of law. (*h*) "Where H. covenants not to do an act or thing which was lawful to do, and an act of parliament comes after and compels him to do it, the statute repeals the covenant. So, if H. covenants to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the covenant is repealed." (*i*) And where the defendant covenanted for himself and his assigns not to permit any messuage, &c., to be built on a certain piece of land, which was afterwards taken by a railway company under their compulsory powers, and built upon, it was held that the defendant was not liable for the act of the railway company. (*k*) There is, indeed, nothing to prevent parties, if they choose by apt words to express an intention so to do, from binding themselves, by a contract, as to any future state of the law; but people in general must always be considered as contracting with reference to the law as existing at the time of the contract; and the words showing a contrary intention ought to be very clear to rebut that presumption. (*l*)¹

328. *Payment and acceptance of part of an ad-*

(*g*) *Bute v. Thompson*, 13 M. & W. 1013. *Clark v. Glasgow Ass. Co.*, 1 Macq. H. L. C. 668.

(*h*) *Brown v. London (Mayor, &c.)*, 30 L. J., C. P. 225; 31 Id. 280; 9 C. B., N. S. 726; 13 Id. 828.

(*i*) *Brewster v. Kitchell*, 1 Salk. 198.

(*k*) *Baily v. De Crespigny*, L. R., 4 Q. B. 180; 38 L. J., Q. B., 98. *Mills v. East London Union*, L. R. 8 C. P. 79.

(*l*) *Maule, J., Mayor of Berwick v. Oswald*, 3 El. & Bl. 665; 23 L. J., Q. B. 324.

¹ And see, as to the impossibility of performance, *Harmony v. Bingham*, 2 Kern. 99; *White v. Mann*, 26 Me. 361; *Gilpins v. Consequa*, Pet. C. C. 86. There is no presumption that a contract, which can be performed without any violation of law, will not be so performed. *Sheffield v. Balmer*, 52 Mo. 574; *Jones v. Judd*, 4 Comst. 412.

mitted simple contract debt is not in general a satisfaction of such debt; (*m*) but if disputes exist as to the exact amount due, or the money be paid in advance, or some consideration be given and accepted, then the payment and acceptance of the smaller sum may be a satisfaction and discharge of the claim for the larger amount; (*n*) and a creditor may agree to take less than the amount of his debt, provided payment is made by a particular day, and in default may recover the whole debt. (*o*) Composition deeds, moreover, form an exception to this rule. (*p*) Payment and acceptance of part of an admitted debt may, under certain circumstances, be evidence of a gift of the remainder. (*q*)¹

329. *Payment and acceptance before action of the full amount of an admitted simple contract debt* is a satisfaction of the debt and of the nominal damages resulting from the detention or non-payment of the debt. (*r*) By the bank holidays act, 1871, (*s*) no person can be compelled to make any payment upon the

(*m*) *Watters v. Smith*, 2 B. & Ad. 890. *Down v. Hatcher*, 10 Ad. & E. 121.

(*n*) *Cumber v. Wane*, 1 Smith's L. C. 291-293, 5th ed. *Cooper v. Parker*, 14 C. B. 118. *Post*, sect. 2, ACCORD AND SATISFACTION.

(*o*) *Thompson v. Hudson*, L. R., 2 Ch. 255; 36 L. J., Ch. 388.

(*p*) *Post*, sect. 2, ACCORD AND SAT-

ISFACTION. *Pfleger v. Browne*, 28 Beav. 391.

(*q*) *Bramston v. Robins*, 12 Moore, 80.

(*r*) *Beaumont v. Greathead*, 2 C. B. 500. *Triston v. Barrington*, 16 M. & W. 61; 16 L. J., Ex. 2. *Gell v. Burgess*, 7 C. B. 16. *Thane v. Boast*, 12 Q. B. 815.

(*s*) 34 Vict. c. 17, s. 3.

¹ *Booth v. Tyson*, 15 Vt. 515; *Champlin v. Rowley*, 13 Wend. 285; 18 Id. 187; *Mead v. Degolyer*, 16 Id. 632; *Paige v. Ott*, 5 Den. 406; *McKnight v. Dunlop*, 4 Barb. 36; *Fenton v. Clark*, 11 Vt. 557; *Dickey v. Linscott*, 20 Me. 453; *Fuller v. Brown*, 11 Metc. 440; *St. Albans St. Co. v. Wilkins*, 8 Vt. 54; *Hair v. Bell*, 6 Id. 35; *Philbrook v. Belknap*, Id. 383; *Brown v. Kimball*, 12 Id. 617; *Ripley v. Chipman*, 13 Id. 268; *Stark v. Parker*, 2 Pick. 267; *Olmstead v. Beale*, 19 Id. 528; *Gilman v. Hall*, 11 Vt. 510.

bank holidays thereby established which he would not be compelled to make on Christmas Day or Good Friday; and the obligation to make such payment is postponed to the day following such bank holiday.

330. *Payment according to the direction of the creditor.*—If a debtor is directed by his creditor to remit the amount of the debt by the post, the debtor is discharged by the delivery at the post-office of a letter containing the money addressed to the creditor at his usual place of residence. But the debtor is not discharged by the delivery of the letter to a bellman in the street, or by the transmission through the post of a letter addressed to the creditor at some large town, without any specification of the street or number of the house in which the latter resides, unless it be shown that the letter and money came safe to hand, or that the address was given by the creditor himself. (t) If a creditor desires his debtor to pay the amount of the debt to his (the creditor's) account at a particular banker's, the debt is discharged as soon as the payment has been made pursuant to the directions given; and if a creditor and debtor both keep an account with the same banker, and the amount of the debt is, at the request or with the assent of the creditor, transferred by the banker from the debtor's to the creditor's account, the transfer is equivalent to a payment, and the debt is extinguished. (u)¹ But a promise to make a transfer of the credit, from one account to the other, is not equivalent to an actual transfer; and, therefore, where a debtor directed his banker to

(t) *Warwicke v. Noakes*, 1 Peake, Bing. 112. *Bolton v. Richard*, 6 T. 98. *Hawkins v. Rutt*, Id. 248. R. 129. *Bodenham v. Purchas*, 2 B. & Ald. 47.
(u) *Eyles v. Ellis*, 12 Moore, 306; 4

¹ See *ante*, section 21.

place a sum of money to the credit or to the account of the creditor at a future day, and the banker promised to do so, but became bankrupt before the time arrived, it was held that there was no payment and no extinguishment of the debt. (*v*)

331. *Payment to a person found in a merchant's counting-house*, in possession of the merchant's account books, and apparently intrusted with the conduct of the business, is a good payment to the merchant himself, although the party receiving the money has in fact no authority from the merchant to receive it, and is not in his employment. (*x*) But where goods deposited with a warehouse-keeper were sold by the owner, and the warehouse-keeper's clerk, after the sale, wrote without authority to the purchaser, and falsely represented that his employer, the warehouse-keeper, was authorized to receive the money on behalf of the vendor, and induced the purchaser, by false statements, to send a remittance by post, in a letter addressed to the warehouse-keeper, and the clerk got possession of the letter, and absconded with the money, it was held that there had been no payment to the vendor. (*y*)¹

332. If a creditor requests his debtor to pay a sum of money on his (the creditor's) account to a third party, and the money is paid, this is an equivalent to a payment to the creditor himself. (*z*). And if part of a money demand is paid in cash, and the residue is, by agreement, paid into the hands of a stake-holder or trustee to await the adjustment of certain differences,

(*v*) *Pedder v. Watt*, 2 Peake, 41.

(*y*) *Kaye v. Brett*, 19 L. J., Ex. 346 ;

(*x*) *Barrett v. Deere*, M. & M. 201. 5 Exch. 269.

Willmott v. Smith, Id. 238 ; 3 C. & P.

453. *Maule, J., Mitcheson v. Oliver*, 76.

5 El. & Bl. 439.

(*z*) *Roper v. Bumford*, 3 Taunt.

¹ See *ante*, sections (pp. 254, 255, et seq.).

the payment is a good payment in satisfaction and discharge of the original cause of action. (a)

333. *Payment by bill or note.*¹—Generally speaking, when a bill or note is taken in lieu of present payment of a debt, it is no more than giving an extended credit, postponing the demand for immediate payment, or giving time for payment on a future day, in consideration of receiving this species of security, so that, if the bill or note is not paid at maturity, the creditor may sue for his demand independently of the bill or note, just as if it had never been given. (b) But if the creditor has received the bill or note as cash, or if at the time of receiving it he has agreed to take upon himself the risk of its being paid at maturity, or if the security is marred by the creditor's own laches in omitting to present it or give notice of its dishonor, the bill becomes money in his hands as between himself and the person from whom he received it, (c) and the debt will be actually paid and discharged by the delivery and acceptance of the security. (d) If a creditor, after he has received a bill or note on account of a debt, sues for the debt, a plea by the debtor that a bill or note payable to a third person, or his order, or to bearer, or made by a third person, was given by him, or by a stranger, to the creditor, and was accepted by him for and on account of the debt, is a sufficient answer in the first instance to the action; and it is for the plaintiff to rebut the plea by showing

(a) *Page v. Meek*, 32 L. J., Q. B. 4; 3 B. & S. 259.

(b) *Sayer v. Wagstaff*, 5 Beav. 423. *Maillard v. Duke of Argyll*, 6 Sc. N. R. 938. *London, Birmingham, and South Staffordshire Bank, Limited, In re*, 34 L. J., Ch. 418.

(c) *Peacock v. Pursell*, 14 C. B., N. S. 728; 32 L. J., C. P. 266.

(d) *Sard v. Rhodes*, 1 M. & W. 155. *Guard. Lich. Un. v. Greene*, 1 H. & N. 889; 26 L. J., Ex. 140. *Caine v. Coulton*, 1 H. & C. 768; 32 L. J., Ex. 97. *Smith v. Mercer*, L. R., 3 Ex. 51; 37 L. J., Ex. 24. 3 & 4 Anne, c. 9, s. 7.

¹ See *post*, p. 488, note 1; p. 492, note 1.

that the bill was overdue and unpaid at the time of the commencement of the action, and that it remains dishonored in his possession or that of his agents. (e) And it is no answer that the debtor has been sued upon the bill, and that judgment has been obtained against him, if the judgment is unsatisfied, and the creditor alone is entitled to put it in execution. (f) But, in the absence of any agreement to the contrary, the acceptance of a bill of exchange only suspends the remedy for a debt, and does not deprive the creditor of any lien he may have for the debt. (g) If the creditor of a firm in partnership takes the separate bill or note of one of the partners on account of the partnership debt due to him, his remedy against the firm will be suspended whilst the note is running; but the firm at large will not be discharged in case of the non-payment of the instrument when it arrives at maturity, unless it can be proved to have been given and received in satisfaction and discharge of the partnership debt, or unless there has been laches or neglect on the part of the creditor or holder in not using the due and customary means of obtaining payment, and the partnership has consequently been prejudiced thereby. (h) If a joint bill, or note of the firm at large, is accepted by the creditor on account of his debt, and the holder, instead of obtaining payment when the bill becomes due, elects to take the separate bill of one of the partners alone, this may

(e) *Belshaw v. Bush*, 11 C. B. 201; 22 L. J., C. P. 24. *Simon v. Lloyd*, 2 C. M. & R. 189. *James v. Williams*, 13 M. & W. 833. *Mercer v. Cheese*, 5 Sc. N. R. 664. *Maillard v. Duke of Argyll*, 6 Id. 938. *Price v. Price*, 16 M. & W. 241. *Fearn v. Cochrane*, 4 C. B. 285.

(f) *Tarleton v. Allhusen*, 2 Ad. & E. 32

(g) *London, Birmingham & South Staffordshire Bank, In re*, 34 Beav. 332; 34 L. J., Ch. 418.

(h) *Bedford v. Deakin*, 2 B. & Ald. 217. In these cases there is the joint liability of the whole firm in case of non-payment, in addition to the separate liability of the single partner on the bill. *Bottomley v. Nuttall*, 5 C. B., N. S. 14; 28 L. J., C. P. 110.

be evidence of an agreement on his part to take the sole and separate security of the one partner in satisfaction and discharge of the partnership debt; (i) "for many cases may be conceived where the sole liability of one or two debtors may be more beneficial than the joint liability of two, either in respect of the solvency of the parties, or the convenience of the remedy." (k)¹

(i) *Evans v. Drummond*, 4 Esp. 91.
Reed v. White, 5 Esp. 122.

(k) *Thompson v. Percival*, 5 B. & Ad. 932. *Lyth v. Ault*, 21 L. J., Ex. 217.

¹ Says Parsons (on Contracts, vol. ii. p. 267): "Payment is also often made by the debtor's giving his own negotiable promissory note for the amount. In Massachusetts, such note is said in some cases to be an absolute payment and a discharge of the debt. It is said that this rule has prevailed in that state from colonial times; and it rests upon the danger which the promisor would be under of being obliged to pay the note to an innocent indorsee, after he had paid the sum due on a suit brought by his creditor on the original contract. But most of the cases in Massachusetts treat it only as a presumption of payment, in the absence of circumstances going to show an opposite intention. And the same rule is recognized in Maine and Vermont. But even in this the law in those states differs from the rule as held in the courts of the United States, and of the state courts generally. There it is held that a negotiable promissory note is not payment, unless circumstances show that such was the intention of the parties." And see *Wallace v. Agry*, 4 Mason, 336; *Smith v. Smith*, 7 Foster, 244; *Van Ostrand v. Reed*, 1 Wend. 424; *Burdick v. Green*, 15 Johns. 247; *Hughes v. Wheeler*, 8 Cow. 77; *Booth v. Smith*, 3 Wend. 66; *Bill v. Porter*, 9 Conn. 23; *Davidson v. Bridgeport*, 8 Id. 472; *Elliott v. Sleeper*, 2 N. H. 525; *Frisbie v. Larned*, 21 Wend. 450; *St. John v. Purdy*, 1 Sandf. 9; *Hawley v. Foote*, 19 Wend. 516; *Cole v. Sackett*, 1 Hill, 516; *Waydell v. Luer*, 5 Id. 448; *Van Eps v. Dillaye*, 6 Barb. 244; *Pratt v. Foote*, 5 Seld. 463; *Commercial Bank v. Bobo*, 9 Rich. 31; *Mooring v. Mobile M. D. & M. I. Co.* 27 Ala. 254; *Thacher v. Dinsmore*, 5 Mass. 299; *Whitcombe v. Williams*, 4 Pick. 228; *Watkins v. Hill*, 8 Id. 522; *Reed v. Upton*, 10 Id. 525; *Maneely v. McGee*, 6 Mass. 143; *Wood v. Bodwell*, 12 Pick. 268; *Ilisley v. Jewett*, 2 Metc. 168; *Butts v. Dean*, 2 Id.

334. *Acceptance of renewed bills.*—Where an action was brought upon a bill of exchange, and it was agreed between the parties that the action should be stayed, and that the defendants should pay the costs, renew the bill, and give a warrant of attorney to secure the debt, and the defendants renewed the bill and gave the warrant of attorney, but did not pay the costs, it was held that the plaintiff might bring a fresh action upon the first bill while the second was outstanding in the hands of an indorsee. (*l*) But, where a bill was dishonored, and the debtor gave the creditor another bill, and a warrant of attorney to confess judgment in case of the non-payment of the second bill, and agreed to pay the expenses of the execution of the warrant of attorney, and the second bill was duly honored, but those expenses were not paid, it was held that the creditor could not sue the debtor upon the original bill for the purpose of recovering those expenses, as the payment of the second bill operated as a discharge of the first, but that they might be recovered as money paid by the creditor for the use of the debtor. (*m*) If a renewed bill is taken in exchange for a former bill, no action can be maintained upon the first bill until the second bill becomes

(*l*) *Norris v. Aylett*, 2 Campb. 328. (*m*) *Dillon v. Rimmer*, 7 Moore, 431.

76; *Curtis v. Hubbard*, 9 Id. 322; *Thurston v. Blanchard*, 22 Pick. 18; *Melledge v. Boston Iron Co.* 5 Cush. 158; *Varner v. Nobleborough*, 2 Greenl. 121, and note *a*; *Descadillas v. Harris*, 8 Greenl. 298; *Newall v. Hussey*, 18 Me. 249; *Bangor v. Warren*, 34 Id. 324; *Fowler v. Ludwig*, Id. 455; *Shumway v. Reed*, Id. 560; *Gilmore v. Bussey*, 3 Fairf. 418; *Comstock v. Smith*, 23 Me. 302; *Gooding v. Morgan*, 37 Id. 419. But this rule never applies to notes not negotiable. *Trustees, &c. v. Kendrick*, 3 Fairf. 381; *Edmond v. Caldwell*, 15 Me. 340; *Wait v. Brewster*, 31 Vt. 516; *Dixon v. Dixon*, 31 Id. 450; *Peter v. Beverly*, 10 Pet. 567; *Sheehy v. Mandeville*, 6 Cranch, 253.

due, and has been dishonored and returned, (*n*) unless the second bill does not extend to and cover the interest that had accrued due on the first bill at the time such second bill was given, in which case the giving of the second bill does not preclude the creditor from suing upon the first bill for the recovery of such interest. (*o*)

335. *Actions for debts secured by dishonored bills or notes.*—When a plaintiff sues for a debt for which a dishonored bill or note has been given, he must be prepared to show that the instrument is in his possession or under his control, and not outstanding in the hands of an indorsee or any party entitled to sue upon it; (*p*) but, where, at the request of the creditor, the debtor delivers a promissory note on account of the debt to third persons, as trustees for the creditor, and the debtor knows at the time that these persons are such trustees, the fact that the note is still in their hands is no answer to an action by the creditor for the recovery of his original debt when the note is due and unpaid. (*q*) He must also, if the bill or note is made or accepted by some third party, and is indorsed by the debtor himself, show that it was presented for payment at the time it became due, and that it was dishonored; (*r*) but if the debtor's name does not appear upon the face of the bill, the creditor is not bound to prove that he gave notice of dishonor either to the drawer or the debtor. (*s*) The keeping of the security an unreasonable time, without present-

(*n*) *Kendrick v. Lomax*, 2 C. & J. 405.

(*o*) *Lumley v. Musgrave*, 5 Sc.

(*p*) *Hadwen v. Mendizabel*, 10 Moore, 477; 2 C. & P. 20. *Burden v. Halton*, 1 M. & P. 223; 4 Bing. 454. *Price v. Price*, 16 M. & W. 243.

(*q*) *National Savings Bk. Associa-*

tion v. Tranah, 36 L. J., C. P. 260 L. R., 2 C. P. 556.

(*r*) *Peacock v. Pursell*, 32 L. J., C. P. 266; 14 C. B., N. S. 728.

(*s*) *Godwin v. Coates*, 1 Mood. & Rob. 221. *Swinyard v. Bowes*, 5 M. & S. 62. *Bishop v. Rowe*, 3 Id. 368.

ing it for payment, has been held to be evidence that the creditor accepted it by way of payment in satisfaction and discharge of the debt. (*t*) The delivery and receipt of a negotiable instrument on account of a debt is payment, by the 3 and 4 Anne, c. 9, s. 7, if the person accepting it does not take his due course to obtain payment thereof by endeavoring to get it accepted and paid. (*u*) If the bill or note is duly honored at maturity, the payment dates from the time the money due on it was paid, and not from the time the bill or note was originally given, unless there be circumstances to show that the delivery and acceptance of the security were regarded by the parties as actual payment. (*x*) Fraudulent and invalid bills and notes may in general be considered as waste paper; and the creditor may resort at once to his original demand. (*y*)

336. *Payment by check*—The production of a check drawn by the defendant on his bankers, having the plaintiff's name or signature in his own handwriting, or that of his agent, on the check, is *prima facie* evidence of payment. (*z*) The circumstance, also of a check having been made payable to the defendant, and of the defendant having received the amount of the check, is proof of payment. (*a*) If the debtor makes an order upon his banker for payment of the amount of the debt, and the creditor accepts it, and keeps it in his hands an unreasonable time before presenting it for payment, and the banker becomes insolvent, the debtor is discharged on ac-

(*t*) *Griffith v. Pope*, cited Andr. 189.

(*u*) *Price v. Price*, 16 L. J., Ex. 99.

(*x*) *In re Harries*, 13 M. & W. 3.

(*y*) *Earl of Bristol v. Wilsmore*, 1 B. & C. 514; 2 D. & R. 755. *Tindal, C. J., Maillard v. Duke of Argyll*, 6

Sc. N. R. 945. *Wilson v. Vysar*, 4 Taunt. 288. *Cundy v. Marriott*, 1 B. & Ad. 696.

(*z*) *Egg v. Barnett*, 3 Esp. 197.

(*a*) *Mountford v. Harper*, 16 L. J., Ex. 184.

count of the laches of the creditor. And the rule is the same, where the creditor accepts the check of the agent of the debtor. It is difficult to say what is an unreasonable time; and probably each case must depend more or less on its own circumstances. In one case four months, (*b*) and in another three weeks, (*c*) were held to be an unreaaonable time for a draft, check, or order on a banker to be retained without presentment in the hands of the creditor. If the creditor, on presenting the draft or order to the banker or person on whom it is made, has the opportunity of receiving a cash payment, and for his own convenience, or the convenience of the drawee, elects to take a note or bill for the amount, the original debt is discharged. (*d*)¹

A payment good by the law of the country where it is made is good here. (*e*) If parties meet together and state an account, and various pecuniary claims are made and allowed on both sides, and a balance is struck and paid over, and the account settled, the allowances in account are, in contemplation of law, payments. (*f*) But this is not the case where the items are all on one side. (*g*)

(*b*) *Chamberlyn v. Delarive*, 2 Wils.
353. *Smith v. Wilson*, Andr. 190.

(*c*) *Hopkins v. Ware*, L. R., 4 Ex.
265; 38 L. J., Ex. 147.

(*d*) *Post*, p. 500.

(*e*) *Ralli v. Dennistoun*, 6 Exch. 483.

(*f*) *Callander v. Howard*, 10 C. B.
290; 19 L. J., C. P. 312. *Holland v.*

Russell, 30 L. J., Q. B. 313; 1 B. & S.
424.

(*g*) *Perry v. Attwood*, 25 L. J., Q.

B. 408.

¹ When payment is made by check, the receiver may treat it as a nullity, if he derive no benefit from it, provided he has been guilty of no negligence (*Merchants' Bank v. Spicer*, 6 Wend. 433; *Gough v. Staats*, 13 Id. 549). If drawn on a bank where the drawer knows he has no funds, it need not be presented at all, for such a transaction is a fraud in the drawer which deprives him of al. right of presentation or demand (*Parsons on Contracts*, 634; *Franklin v. Vanderpoel*, 1 Hall, 78. And see *ante*, p. 488, note 1.

337. *Payment by a stolen bank note*—A bank-note payable to bearer, and transferable by delivery, is considered as money, so that every person who takes it by way of payment of a debt, in the ordinary course of business, has a good title to it; and his right to enforce payment of it is unaffected by any infirmity of title in the person who delivered it to him. (*h*) If, therefore, a tradesman gives change for a stolen note in ignorance that the note has been stolen, and then pays the note to a creditor in discharge of a debt, the payment is a good payment, the creditor having a valid title to the note, and being able to enforce the security against the banker who has issued it. (*i*)

338. *Payment by a stranger*—Where one makes a payment in the name and on behalf of another without authority, it is competent for the debtor to adopt and ratify the payment, (*k*) even after the creditor has commenced an action for the debt, (*l*) but, where the payment is not made by way of gift for the benefit of the debtor, but by a person who intended that he should be reimbursed by the debtor, but who had not the debtor's authority to pay, it is competent for the creditor and the person paying to rescind the transaction at any time before the debtor has affirmed the payment, and repay the money, and thereupon the effect of the payment is at an end, and the debtor remains responsible. (*m*)

339. *Proof of payment*.—Where the plaintiff's attorney wrote to the defendant, requesting him to

(*h*) *Raphael v. Bank of England*, 17 C. B. 161. And see *Lucas v. Wilkinson*, 1 H. & N. 420; 26 L. J., Ex. 13. *Bush*, 11 C. B. 191; 22 L. J., C. P. 24. *Cork v. Lister*, 13 C. B., N. S. 543, 594; 32 L. J., C. P. 121, 126. Inst. lib. 3, tit. 29, 1.

(*i*) *Miller v. Race* 1 Burr. 452; 1 Smith's L. C. 450, 5th ed. *Grant v. Vaughan*, 3 Burr. 1516. (*l*) *Simpson v. Eggington*, 10 Exch. 845; 24 L. J., Ex. 312.

(*m*) *Walter v. James*, L. R., 6 Ex. 124; 40 L. J., Ex. 104. (*k*) *Co. Litt.* 206 b. *Belshaw v.*

remit the balance due to the plaintiff, with 13s. 4d costs, and the defendant sent a bank-bill for the amount of the debt only, which the plaintiff's attorney, by letter, refused to receive, but nevertheless retained, it was held that the facts constituted evidence of payment, and that the attorney had no right to keep the bank-bill and then proceed as if he had never received it. (n) Where, however, there was a request to remit, and a post-office order was sent, which was not available because a mistake had been made in the name of the payee, it was held that there was no evidence of payment, although the order had been retained by the latter; (o) and where the defendant sent the plaintiff a check which purported to be drawn for the balance of the plaintiff's account, and would consequently, if presented by him, have been tantamount to the giving a receipt in full for all demands, and the plaintiff, by letter, declined to receive the check as a payment of all that was due, and expressed his willingness to return it, but retained it in his hand, it was held that there was no evidence of payment. (p)¹

340. Presumption of payment.—Any great lapse of time, without demand of payment, and without any acknowledgment of the existence of a debt, affords a prima facie presumption that payment has been made. (q)² Where servants are in the habit of being

(n) *Caine v. Coulton*, 1 H. & C. 768; (p) *Hough v. May*, 4 Ad. & E. 954.
32 L. J., Ex. 97. (q) *Cooper v. Turner*, 2 Stark.

(o) *Gordon v. Strange*, 1 Exch. 477. 497.

¹ Where a remittance is made by mail in payment, the debtor must show that it was properly sealed and directed and delivered at the post-office, and that he was authorized, either by custom between him and his creditor or otherwise to send by mail (See *Morgan v. Richardson*, 13 Allen, 410; *Gurney v. Howe*, 9 Gray, 404; *Buell v. Chapen*, 99 Mass. 594; *Crane v. Pratt*, 12 Gray, 348).

² A lapse of twenty years was added to constitute such a

paid weekly or monthly, and supporting themselves by their week's or month's wages, the presumption is in favor of a regular payment having been made, according to the ordinary course of the business or employment, in the absence of any demand of payment on the part of the servant, or any admission or acknowledgment, on the part of the employer, of arrears being due. (r) A general receipt, on the back of a bill of exchange, is no evidence of payment of the bill by the acceptor. The receipt, of itself, shows nothing until it is explained. (s) But when bills, proved to have been once in circulation after having been accepted, get back again into the hands of the acceptor, and are produced by him, the presumption is that he has got them back by having paid them. Receipts on the bills, to be evidence of payment, must be shown to be in the handwriting of the defendant, or of some other person authorized to receive payment of the bills. (t)

341. Receipt.—A receipt is nothing more than a prima facie acknowledgment that money has been paid, and may be contradicted or explained. (u)¹

(r) *Lucas v. Novosilieski*, 1 Esp. 295.

(u) *Skaife v. Jackson*, 3 B. & C. 421.

(s) *Phillips v. Warren*, 14 M. & W. 380.

Graves v. Key, 3 B. & Ad. 313. *Lee v. Lancashire and Yorkshire Ry. Co.*

(t) *Pfiel v. Vanbatenberg*, 2 Campb.

L. R., 6 Ch. 527.

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presumption in *Bird v. Inslee* (23 N. J. Eq. 363). But it must be pleaded (*Minor v. Beekman*, 14 Abb. (N. Y.) Pr. N. S. 1; *Edwards v. Giboney*, 51 Mo. 129; and see, generally, *N. Y. Life Ins. Co. v. Covert*, 3 Abb. (N. Y.) App. Dec. 350; *Lyon v. Adde*, 63 Barb. 89; *Daly v. Ericsson*, 45 N. Y. 786; *Barned v. Barned*, 21 N. J. Eq. 245, *Connolly v. McKean*, 64 Pa. St. 113; *Birkey v. McMakin*, Id. 343; *Talliaferro v. Ives*, 51 Ill. 247; *Elston v. Kennicott*, 52 Id. 272).

¹ *Stackpole v. Arnold*, 11 Mass. 27; *Harden v. Gordon*, 2 Mason, 561; *Putnam v. Lewis*, 8 Johns. 389; *Monell v. Lawrence*, 12 Id. 521; *Melledge v. Boston Iron Co.*, 5 Cush. 158

342. *Payment to an agent, in the ordinary course of business*, is a payment to the principal, unless the latter has countermanded the agent's authority, and given the proper notice to the defendant before the payment was made. Payment to the solicitor of a plaintiff in an action, is a payment to the plaintiff himself, but not a payment to an agent of the solicitor. (x) An agent employed to sell an estate has no implied authority to receive the purchase-money. (y) And an authority to receive the interest of a sum of money, invested on mortgage or other real or personal security, does not carry with it any authority to receive the principal, unless the party receiving the interest was himself previously intrusted with possession of the principal, and has himself invested it, and dealt with it in pursuit of the ordinary trade or calling of a scrivener or money-lender. If a scrivener lends another's money in his own name, payment to him is a good payment; and if, being intrusted with the money, he lends it in the name of his client, on the security of a bond, and holds the bond in his hands, he is dealing with the money in the way of his trade, and a receipt of it by him is a receipt by his principal. But a scrivener or money-lender who lends out another man's money on mortgage, and holds the mortgage deeds, has no implied authority to receive the principal after the day appointed for payment, by the ordinary condition of defeasance, has passed. He has himself no power to re-convey the estate, and can not release the mortgage debt. (z)

(x) *Yates v. Frickleton*, 2 Doug. 623.(z) *Wilkinson v. Candlish*, 5 Exch.(y) *Mynn v. Joliffe*, 1 Mood. & Rob. 91; 19 L. J., Ex. 166.

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Vancleef v. Therasson, 3 Pick. 12; *Walker v. Christian*, 21 Gratt. 291; *Grumley v. Webb*, 48 Mo. 562; *Ryan v. Ward*, 48 N. Y. 204; *Adams v. Ward*, 26 Ark. 135; *Vaughan v. Bibb*

343. *Mode of payment to agents.*—A money payment is, in general, the only authorized mode of payment, as between commission-agents, for sale, and the purchasers with whom they deal; (*a*) and therefore, if a person buys goods of an agent, knowing him to be an agent, and knowing who the principal is, he cannot, by paying the agent in goods, discharge himself from liability for the price to the principal, without ascertaining whether such a course of dealing has been authorized by the latter. (*b*) So, if a person buys goods of another whom he knows to be acting as agent, though he does not know who the principal is, he cannot set off a debt due to him from such agent, in an action by the principal for the price of the goods. (*c*) Where an agent, employed by a coal merchant to sell coals, made a bargain with a tailor to furnish the latter with coals in return for clothes, and the coals, when sent in, were accompanied by a ticket, in which the coal merchant's name was inserted as the vendor of the coals, it was held that the tailor, after he had received such a ticket, giving notice who the real owner was, ought to have ascertained whether the course of dealing was sanctioned by the latter, and that, not having done so, he could not set up the delivery of clothes to the agent as an answer to the coal merchant's action for the price of the coals. (*d*)

46 Ala. 153. And see *Thrasher v. Anderson*, 45 Ga. 537; *Stapleton v. King*, 33 Iowa, 28; *Knablanck v. Kronchnabel*, 18 Minn. 300; *Nelson v. Robson*, 17 Minn. 284; *Eaton v. Alger*, 2 Abb. (N. Y.) App. Dec. 5; *Joslyn v. Capron*, 64 Barb. 599; *Wilson v. Derr*, 69 N. C. 137.

(*a*) *Barker v. Greenwood*, 2 Y. & C. Ex. 414, 419. *Sweeting v. Pearce*, 7 C. B., N. S. 485; 29 L. J., C. P. 272.

(*b*) *Capel v. Thornton*, 3 C. & P. 352. *Howard v. Chapman*, 4 C. & P. 503.

(*c*) *Semenza v. Brinsley*, 34 L. J., C. P. 161. *Dresser v. Norwood*, 17 C. B., N. S. 466; 34 L. J., C. P. 48.

(*d*) *Pratt v. Wiley*, 2 C. & P. 355. *Cornish v. Abington*, 4 H. & N. 555.

But in the case of a purchase of goods through a broker, it has recently been held that it is a question of fact for a jury, depending on the custom of the trade, whether payment to a broker in advance is a good payment as against the principal. (e)

344. Payment by delivery of a bill of exchange to the agent is not a valid payment to the principal, unless the agent was expressly authorized to receive payment by bill, or unless such payment was in accordance with the usual and customary course of business, or has been assented to and adopted by the principal. (f) "The general rule of law is that, if the creditor employs an agent to receive money of a debtor, and the agent receives it, the debtor is discharged as against the principal; but if the agent, instead of receiving money, writes off money due from him to the debtor, then the latter is not discharged." (g) Thus, where the known agent of a wine merchant sold wine to a customer, who paid for it by returning to the agent his own check, which the customer had cashed a few days previously, it was held that this was not as between the principal and the customer, a payment for the wine sold to the latter through the medium of the agent. (h)

An insurance broker, as agent of the assured, is, in general, only entitled to receive payment for the assured from the underwriter in money. (i) But, where an insurance broker or other mercantile agent has been employed to receive money for another in the general course of his business, and when the known general course of the business is for the agent to keep

(e) *Cattrell v. Hindle*, L. R., 2 C. P. 368; 35 L. J., Q. B. 161.

(f) *Ward v. Evans*, 2 Ld. Raym. 930. *Williams v. Evans*, L. R., 1 Q. B. 352; 35 L. J. Q., B. 111.

(g) *Russell v. Bangley*, 4 B. & Ald. 398.

(h) *Underwood v. Nicholls*, 17 C. B. 239; 25 L. J., C. P. 79.

(i) *Todd v. Ried*, 4 B. & Ald. 210.

a running account with the principal, and to credit him with sums which he may have received by credits in accounts with the debtors, with whom he always keeps running accounts, and not merely with moneys actually received, the rule laid down in those cases cannot properly be applied; but it must be understood that, where an account is bona fide settled according to the known usage, the original debtor is discharged, and the agent becomes the debtor according to the meaning and intention and with the authority of the principal. (*k*)

When money has been paid to an agent to be transmitted to his principal, or to be placed to the credit of the latter in his account with his agent, the party paying the money loses all control over it as soon as it reaches the hands of the agent. (*l*)¹

345. *Payment to a creditor of the creditor.*—Payment by a garnishee, on execution levied upon him in accordance with the common law procedure act, 1854, is a valid discharge to the garnishee, as against the judgment debtor, to the amount paid or levied, although the proceedings may be set aside or the judgment reversed. (*m*) But to discharge the garnishee there must be a judge's order for payment; payment upon notice of attachment only is no discharge. (*n*)²

346. *Payment by an agent.*—If the principal has authorized the agent to pledge his, the principal's,

Wall v. Cockerell, 10 H. L. C. 229.

But see Catterall v. Hindle, L. R., 2

C. P. 368; 35 L. J., Q. B. 261.

(*k*) Stewart v. Aberdeen, 4 M. & W.
211.

(*l*) Williams v. Deacon, 4 Exch.

497.

(*m*) 17 & 18 Vict. c. 125, s. 65.

(*n*) Turner v. Jones, 1 H. & N.
878.

¹ See *ante*, pages 136 et seq., as to powers, authority and contracts of agents.

² And see Noble v. Thompson Oil Co., 69 Pa. St. 409.

credit in the commercial world, and the principal is consequently disclosed and debited in the first instance he at once becomes responsible upon the contract, and continues liable until the creditor has received actual payment, or has taken security from the agent, having had an option of a cash payment from the latter at the time he did so. If the principal furnishes the agent with money to pay the debt, and the agent instead of making a cash payment, gives the creditor a bill of exchange or promissory note, or a check on a banker, and the security fails or is dishonored, the principal is not discharged, unless it appears that the creditor knew that he might have had cash, but preferred a bill for his own accommodation. If, having had the option of receiving money, he nevertheless thinks fit to take the acceptance of the agent, he is deemed to have accepted the credit and responsibility of the latter, in lieu of that of the principal, and to have discharged the principal. (o) And, if he gives his receipt to the agent as for a cash payment, when he has only obtained a bill, and the principal pays money to the agent, and alters the state of his accounts with the latter to his, the principal's, own prejudice, upon the supposition that the demand has been satisfied as the receipt imports, the creditor cannot afterwards, in case of the insolvency of the agent, and the failure of the security he has taken from the latter, resort to the principal for payment. (p)

If, on the other hand, the principal is not known or disclosed at the time of the making of the contract, if the agent deals in his own name, and is debited

(o) *Marsh v. Pedder*, 4 Campb. 257.
Strong v. Hart, 9 D. & R. 192; 6 B.
 & C. 160. *Smith v. Ferrand*, Id. 303.
Tapley v. Martens, 8 T. R. 453. *Rob-*
inson v. Read 9 B. & C. 449. *Clarke*

v. Noel, 3 Campb. 411. *Everett v.*
Collins, 2 Id 515. *Anderson v. Hil-*
lies, 12 C. B. 504.

(p) *Wyatt v. Hertford*, 3 East,
 147.

accordingly, and the principal, in ignorance of the intention of the creditor to look to him for payment has furnished the agent with funds for the liquidation of the debt, he is thenceforth discharged, and the creditor cannot afterwards, if the agent dies, or becomes insolvent with the money in his hands, resort to the principal for payment. (q) But the mere circumstance of the agent's being indebted to the principal at the time of his insolvency, or of his having a balance in hand out of which he might have paid the debt, is not of itself sufficient to discharge the principal. (r) It must be shown that the debt was incurred by the agent, and the state of the accounts altered to the prejudice of the principal, subsequently to the incurring of the particular debt, in order that the agent might have the means of discharging it, and upon the understanding that the balance appearing in favor of the principal, and so allowed to accrue, was to be appropriated for that purpose.

347. *Payment to one of several partners* in trade is a payment to the firm at large, although the partnership have appointed a collector to get in the partnership debts, and the payment was made with notice of such appointment. (s) But payment by a banker or depositary of a sum of money deposited in his hands by several persons jointly to one of the joint depositors, without the express authority of the others, is not a valid payment as against them.

348. *Payments to trustees, executors, &c.*—Payment to one of two trustees acting in the execution of a trust, is a payment to both, unless the payment

(q) *Smyth v. Anderson*, 7 C. B. 36, 18 L. J., C. P. 109. *Kymer v. Suwercroft*, 1 Campb. 109. *Heald v. Kenworthy*, 10 Exch. 739; 24 L. J., Ex.

76. *Armstrong v. Stokes*, L. R., 7 Q. B. 598; 41 L. J., Q. B. 253.

(r) *Waring v. Favenck*, 1 Campb. 85.

(s) *Porter v. Taylor*, 6 M. & S. 56.

be a payment between banker and customer. (t) It is part of the law merchant that bankers shall not pay to one of several persons jointly interested without the consent of the others except by express agreement. Therefore, if two persons give a power of attorney to bankers to sell out their joint stock, the bankers must place the proceeds to the joint account of the two, and both must concur in drawing out the money. If it is meant that the money should be paid to one, an authority ought to be given to that effect by the other to the bankers; (u) and if money is paid into a bank by three persons not partners, one of them cannot draw checks without the concurrence or authority of the others, as it would defeat the object of paying in the money jointly. (x) Payment to one of several executors of a debt due to their testator is a good payment as against the others; for each executor has authority under the will to collect and receive debts due to the estate independently of his co-executors. (y) Payment to a person who has obtained probate of a forged will is a discharge from further liability, to the party so paying although the probate be afterwards declared null, and administration be granted to the intestate's next of kin; for the debtor cannot controvert the authority of the probate so long as it remains unrepealed. (z) Payment, also to an administrator, before the will is found, is a good defense to an action subsequently brought by an executor. (a) Payment, also, to one of several assignees of a bankrupt's estate of a debt due to the bankrupt

(t) *Husband v. Davis*, 10 C. B. 645; 20 L. J., C. P. 118. *Wallace v. Kells*, 7 M. & W. 372.

(u) *Stone v. Marsh R. & M.* 369.

(x) *Innes v. Stephenson*, 1 Mood. & Rob. 147.

(y) *Can v. Read*, 3 Atk. 695.

(z) *Allen v. Dundas*, 3 T. R. 125.

(a) *Pond v. Underwood*, 2 Ld. Raym. 1210.

is a valid payment to the assignees generally, (o) unless the other assignees have expressed their dissent, and interfered to prevent the payment. (c)

349. *Payments made to a bankrupt.*—By the bankruptcy act of 1869 nothing therein contained is to render invalid any payment made in good faith and for value received to any bankrupt before the date of the order of adjudication by a person not having at the time of such payment notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication. (d)

350. *Appropriation of payments.*—The general rule of law is that the party who pays money has a right to apply that payment as he thinks fit. (e) If there are several debts due from him, he has a right to say to which of those debts the payment shall be obliged. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money. (f) If, therefore, money becomes due on a bond, and a debt is also owing for goods sold and delivered, and the debtor makes a payment, declaring it to be on account of the bond debt, the creditor cannot appropriate it to the simple contract debt. But if the payment be made generally on account the creditor may appropriate it to whichever debt he pleases. (g) Where two debts were due to the plaintiff, one on a covenant, and the other on a simple contract debt, it was held that he might appropriate payments made generally on account to the simple contract debt. (h)

(b) *Smith v. Jamesons*, 1 Esp. 114. solventis," see *Croft v. Lumley*, 27 L. J., Q. B. 334.

(c) *Bristow v. Eastman*, Id. 174.

(d) 32 & 33 Vict. c. 71, s. 94.

(e) As to the application of the maxim, "solutio accipitur in modum

(f) *Simson v. Ingham*, 2 B. & C. 72. Dig. lib. 46, tit. 3, l. 1, 3.

(g) *Anon.*, Cro. Eliz. 68.

(h) *Peters v. Anderson*, 5 Taunt. 596.

And where a creditor had received money without any specific appropriation by the debtor, he was permitted to appropriate it to the discharge of a purely equitable debt. (*i*) The appropriation by the creditor may be made at any time before the case comes under the consideration of a jury; and he is not bound at the time he makes the appropriation to give the debtor any notice thereof. (*k*) If, however, he communicates his election to the debtor, he is bound thereby, and cannot make a different appropriation without the assent of the debtor.

In the Roman law, if no appropriation was made either by the debtor or the creditor at the time of payment, the payment was appropriated to the most burdensome debt, and no different appropriation could be afterwards made; (*l*) and this rule of the civil law has been adopted and acted upon by our court of chancery. (*m*) But, by the common law, it was held that the payment would not be so appropriated, without some circumstances to show that it was so intended. (*n*)¹

351. *What amounts to an appropriation by the debtor.*—If there are several debts due, and application is made by the creditor for one of these in particular, the payment made in answer to the application is obviously made on account of the specific debt named, and cannot be appropriated by the creditor to a different debt. (*o*) If a bill of exchange becomes due, and the exact amount of the bill is paid by the party liable, the payment is deemed to have been made on

(*i*) *Bosanquet v. Wray*, 6 Taunt. 597.

(*k*) *Philpott v. Jones*, 2 Ad. & E. 44.

(*l*) Dig. lib. 46, tit. 3, l. 35.

(*m*) *Anon.*, 12 Mod. 559. *Clayton's Case*, 1 Mer. 585. *Merriman v. Ward*,

1 Johns. & H. 371. *Devaynes v.*

Noble, Tudor's Lead. Cas. Merc. Law, 1.

(*n*) *Plomer v. Long*, 1 Stark. 154.

(*o*) *Shaw v. Pictou*, 4 B. & C. 715.

¹ See *post*, note 1, p. 506.

account of the bill. (*p*) If goods are sold and delivered on credit for a certain sum, and the exact amount of the purchase-money is subsequently paid, the irresistible presumption is, that the payment was a payment of the price of the goods. (*q*)

352. Appropriation by the creditor.—If there be one debt due on a lawful contract, and another debt arising out of an illegal transaction, the creditor cannot appropriate the payment to the unlawful demand so as to enable him to sue for the lawful debt; (*r*) but if the contract creating the debt is not absolutely unlawful, the creditor being merely prevented from suing upon it by some statutory enactment framed for the purpose of protecting the debtor from particular actions and suits, then the creditor may appropriate the payment to the demand the right of action for which is barred by the statute, and sue for the other debt. Such is the case when the right of action for one of two debts is barred by the statute of limitations, or by the acts regulating the sale of spirituous liquors on credit. (*s*) Where a solicitor had several claims against a corporation for work and services and money paid, some of which he could enforce by action against the body corporate, and some of which he was precluded from enforcing by reason of a technical defect in his appointment, it was held that he might appropriate a general payment to the latter claims, and proceed for the recovery of those debts which the law permitted him to enforce. (*t*) But, where a solicitor delivered a bill containing taxable

(*p*) *Newmarch v. Clay*, 14 East, 244.

(*q*) *Marryatts v. White*, 2 Stark. 102.

(*r*) *Wright v. Laing*, 3 B. & C. 165.

(*s*) *Mills v. Fowkes*, 7 Sc. 444; 5

Bing, N. C. 461. *Williams v. Griffith*, 5 M. & W. 300. *Cruickshanks v. Rose*, 1 Mood. & Rob. 100. *Philpott v. Jones*, 2 Ad. & E. 41.

(*t*) *Arnold v. Mayor of Poole*, 5 Sa N. R. 741.

items, and charges not taxable, and a general payment was made on account, it was held that the attorney could not appropriate the payment to the taxable items, so as to enable him to sue for the other charges without delivering a signed bill pursuant to the statute. (*u*) And where the directors of a company had carried on business unauthorized by the deed of settlement, and money had been paid by the company to their solicitors on account of costs generally, it was held that the solicitors had no right, at any rate *post litem motam*, to appropriate the payment to the costs incurred in respect of the unauthorized business. (*x*)

If there be a debt due from the debtor in a representative character, and another in his own right, a general payment on account is deemed to be a payment of the debt due from the debtor in his own right, and the creditor cannot, without the express assent or direction of such debtor, appropriate it in discharge of a debt due from him as executor or administrator. (*y*) And, where there are distinct demands, one against persons in partnership and another against one only of the partners, if the money paid be the money of the partners, the creditor is not at liberty to apply it to the payment of the debt of the individual; for that would be allowing the creditor to pay the debt of one person with the money of others. (*z*) If there be a legal debt, and a claim which would only become a legal debt on a settlement of partnership accounts and striking a balance, a general payment is applicable only to the legal debt. It cannot be appropriated to the unsettled partnership account, so as

(*u*) *James v. Child*, 2 Cr. & J. 678.

(*y*) *Goddard v. Cox*, 2 Str. 1194.

(*x*) *Phoenix Life Assurance Co., In re*, *Ex parte Howard*, 1 H. & M. 433.

(*z*) *Thompson v. Brown*, M. & M. 41.

to enable the creditor to sue for the undisputed debt, (a)¹

353. *Separate accounts, and one entire running account.*—Where there are distinct accounts and a general payment, and no appropriation by the debtor at the time of payment, the creditor may apply the payment to which account he pleases; but where the account is treated as one entire account by all parties, the payment is deemed, in contemplation of law, to be

(a) *Goddard v. Hodges*, 1 Cr. & M. 39.

¹ The rule in the United States appears to be that the person paying the money has the right to apply the payment, to one to whom he owes money on more than one account, to either debt he sees fit; if he neglects to do so, the creditor receiving the money may apply it as he pleases. If neither party make the application it will be applied by the court, according to the circumstances, the presumption being that the oldest standing debt is intended to be first canceled. But circumstances may vary these rules, and see, as to the question generally *Cremer v. Higginson*, 1 Mason. 338; *United States v. Wardwell*, 5 Id. 85; *Rohan v. Hanson*, 11 Cush. 44; *Haynes v. Nice*, 100 Mass. 357; *Huffstater v. Hayes*, 64 Barb. 573; *Gordon v. Hobart*, 2 Story, 264; *Warren v. Chapman*, 105 Mass. 87; *Baker v. Stackpoole*, 9 Cow. 420; *Seymour v. Van Slyck*, 8 Wend. 403; *Niagara Bank v. Rosevelt*, 9 Cow. 409; *Mitchell v. Dall*, 4 Gill. & J. 361; *Reed v. Boardman*, 20 Pick. 466; *United States v. Kirkpatrick*, 9 Wheat. 320; *Gass v. Stinson*, 3 Sumn. 98; *United States v. Eckford*, 17 Pet. 251; *Upham v. Lefavom*, 11 Metc. (Mass.) 184; *Bancroft v. Dumas*, 21 Vt. 456; *Ayer v. Hawkins*, 19 Metc. (Mass.) 26; *Caldwell v. Wentworth*, 14 N. H. 431; *Allen v. Culver*, 3 Den. 293; *Campbell v. Vedder*, 1 Abb. (N. Y.) App. Dec. 295; *Urmberley v. Brown*, 42 Ga. 604; *Harrison v. Dayries*, 23 La. Ann. 216; *Crompton v. Pratt*, 105 Mass. 525; *Hill v. Robbins*, 22 Mich. 475; *Paterson v. Currier*, 106 Mass. 410; *Marshall v. Sloan*, 26 Ark. 513; *Waterman v. Younger*, 49 Mo. 413; *Howard v. McCall*, 21 Gratt. 205; *Champenees v. Fort*, 45 Wis. 355; *Mueller v. Wiebracht*, 47 Mo. 468; *Plummer v. Erskine*, 58 Me. 59; *Mathews v. Switzler*, 46 Mo. 301; *Jackson v. Burke*, 1 Dill. 311; *Leef v. Goodwin*, Taney, 460; *Sprague v. Hagenwinkle*, 3 Ill. 419; *Duncan v. Helm*, 22 La. Ann. 418; *Moore v. Gray* Id. 289.

made in discharge of the earlier items of the account, so that the creditor cannot select any particular item or class of items, and appropriate the payment to them, to the exclusion of the earlier items in the account. (*b*) But a particular mode of dealing, or an express stipulation between the parties, may vary the case. (*c*) "Where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and the new firm in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt. In that case it is to be presumed that all the parties have consented that it should be considered as one entire account." (*d*) But, if the account is not treated as one entire running account, but is divided into separate and distinct accounts, the payments are not necessarily appropriated to the earlier items. (*e*)

354. Avoidance of payment.—A payment good at the time as extinguishing the debt may be rendered void by matter subsequent, as, in the event of the bankruptcy of the debtor, by the election by his trustee to treat the payment as a fraudulent preference. (*f*) The bankruptcy act of 1869 (*g*) does not avoid, as a fraudulent preference, an act which was not so under the old law; (*h*) and in order, therefore, to constitute a fraudulent preference, the act must be the spontaneous act of the debtor, not bona fide

(*b*) Bayley, J., *Bodenham v. Purchas*, 2 B. & Ald. 45.

(*c*) Clayton's Case, 1 Mer. 585. *Heniker v. Wigg*, 4 Q. B. 795. *Williams v. Rawlinson*, 10 Moore, 371.

(*d*) Bayley, J., 2 B. & C. 72. *Bodenham v. Purchas*, 2 B. & Ald. 46.

(*e*) *Simson v. Ingham*, 2 B. & C. 65.

(*f*) Per Willes, J., *Newington v. Levy*, L. R., 5 C. P. 607, 612; 39 L. J., C. P. 334; see same case, in *Ex. Ch.*, 6 L. R. 180; 40 L. J., C. P. 29.

(*g*) See sect. 92.

(*h*) *Ex parte Tempest*, in *re Craves* and *Marshall*, L. R., 6 Ch. 70.

originating in a demand or some other step of the creditor, and it must be in contemplation of bankruptcy; (*i*) but where a man is in such a hopeless state of insolvency as that it is impossible for him to satisfy his creditors or to carry on his business, he is to be held to contemplate bankruptcy. A payment, however, in the ordinary course of trade, such as honoring bills of exchange presented at maturity, or paying debts which have become due in the usual and customary manner, or a payment made in fulfillment of a contract or engagement to pay in a particular manner or at a particular time, is not open to objection on the ground of being voluntary, although made without any express demand by the creditor, unless the creditor had, at the time, notice of an act of bankruptcy committed by the debtor. (*k*)

355. *Tender of payment.*—Bank of England notes are a good tender for all sums above £5, so long as the Bank of England continues to pay its notes on demand in legal coin; but neither the bank nor any branch bank can make a legal tender of payment in its own notes to a party requiring gold. (*l*) Gold coin is a good tender for payment of any amount. Silver coin is a good tender for sums not exceeding 40s., and bronze coin for sums under 6d. (*m*) But no valid tender can be made of gold, silver, or bronze coin, defaced by names or words stamped thereon, or bent by any machine or instrument. (*n*) If an absolute and unconditional covenant or promise be made for the payment of money, without any time of payment being mentioned, there is an immediate liability

(*i*) *Brown v. Kempton*, 19 L. J., C. P. 169. *Edwards v. Glyn*, 2 E. & E. 29.

(*k*) *Ex parte Blackburn*, In re *Cheeseborough*, L. R., 12 Eq. 358.

(*l*) 3 & 4 Wm. 4, c. 98, s. 6.

(*m*) See the 33 Vict. c. 10, s. 4, as to the legalization of gold coins issued from colonial or foreign mints.

(*n*) 24 & 25 Vict. c. 39, s. 19. *Wade's Case*, 5 Co. 114, a.

and cause of action, in respect of which a writ may be at once issued. Every plea of tender, being pleadable only in bar of the costs of an action, must allege the defendant's continued readiness to pay, accompanied by a payment into court of the money tendered. If the plaintiff can falsify the averment of the defendant's continued readiness, he avoids the plea altogether. (*o*) A demand after tender should be made personally; (*p*) and if there be two joint debtors, a demand of one is a demand of both. (*q*) "If the creditor is offered a larger sum than the amount due to him, and, without any objection on the ground of want of change, makes quite a collateral objection, the tender will be a good tender." (*r*) If the tender is in Bank of England notes, and change is required, which the creditor says he has not got, the tender is insufficient; but if no objection is made on the ground of want of change, the tender is good, provided enough has been tendered. (*s*) If provincial bank-notes or checks on bankers are offered in payment, and not objected to but more money is required, the tender is good, if enough money has been tendered. (*t*)¹

356. Offers of payment not amounting to a tender.—An offer of money by a debtor to a creditor, and a request on the part of the latter for a day's delay before receiving it, on account of an accident, are not a tender and refusal of the money, and do not discharge the debtor. (*u*) We have already seen that readiness to pay a debt, without an actual tender of

(*o*) *Coore v. Callaway*, 1 Esp. 116.
Rivers v. Griffiths, 5 B. & Ald. 630.

(*p*) *Edwards v. Yeates*, R. & M. 360.

(*q*) *Peirse v. Bowles*, 1 Stark. 323.

(*r*) *Bevans v. Rees*, 5 M. & W. 308.
Broom's Maxims, 129.

(*s*) *Black v. Smith, Peake*, 121. *Cadman v. Lubbock*, 5 D. & R. 289.

(*t*) *Polglass v. Oliver*, 2 Cr. & J. 15

Jones v. Arthur, 8 Dowl. P. C. 442.

(*u*) *Jenkins v. Brown*, 14 Q. B. 503.

¹ *Post*, p. 513, note 1.

money or money's worth, is nothing; and, therefore, if a debtor merely offers to pay the debt, there is no tender; (x) but if the debtor, having the money at hand, offers cash, and the creditor tells him he need not give himself the trouble of offering it, or getting it out, or producing it, as he will not take it, the actual production of the money is then dispensed with, and there is a good tender. (y) And where a sum of money was tendered to the maid-servant of the plaintiff, who received it, and said she would take it to her master, and retired, and then came back with the money, saying that her master would not receive it, it was held that this was evidence from which a jury, if they thought fit, might infer that a tender had been made. (z)¹

357. Conditional tenders.—A tender clogged with conditions and reservations, and made in such terms that the party accepting the tender would be drawn into an admission against himself, is a bad tender; for the debtor has no right to expect the creditor to take the money, if by doing so he will furnish evidence against himself of the nature and extent of his demand. (a)² Therefore an offer of money, to be

(x) *Kraus v. Arnold*, 7 Moore, 59.

Leatherdale v. Sweepstone, 3 C. & P.

342.

(y) *Finch v. Brook*, 1 Sc. 70.

Harding v. Davies, 2 C. & P. 78.

(z) *Anon.*, 1 Esp. 349.

(a) *Hastings v. Thorley*, 8 C. & F.

573. *Food v. Noll*, 2 Dowl. N. S.

617.

¹ Tender to a merchant's clerk, at the store, for goods previously bought there, is good, although the claim had then been lodged with an attorney for collection (*Hoyt v. Byrnes*, 2 Fairf. 475; *McIneffe v. Wheelock*, 1 Gray, 600).

² "The tender must be unconditional; so, at least, it is sometimes said; but the reasonable, and we think the true rule is, that no condition must be annexed to the tender, which the creditor can have any good reason whatever for objecting to; as, for instance, that he should give a receipt in full of all demands. It may not perhaps be quite settled that if the

accepted as "all that is due," (*b*) or "in full of all demands," (*c*) or "as the balance due," (*d*) or as a "settlement," (*e*) does not constitute a valid tender. But if the party offers the money as being all that he admits to be due, not requiring the other party to accept it as all that is due, but leaving the latter free to insist upon any ulterior demand, the tender is then a good tender. If he says, "I am come to settle," or, "I am come with the amount of your bill," and then goes on to offer the money, leaving the other party, after he has got the money, to treat it as "a settlement," or as "the amount of the bill," or not, as he may think fit, the tender is a good tender. (*f*) A tender "under protest" is a perfectly good tender. (*g*) If a debtor tendering money requires a receipt for the amount, he ought himself to be prepared with the paper and writing materials, and the stamp, when a stamp is necessary, and tender them to the creditor together with the money. (*h*) A tender to one of

(*b*) *Sutton v. Hawkins*, 8 C. & P. 259. *Field v. Newport, &c. Rail. Co.*, 27 L. J., Ex. 396; 3 H. & N. 409.

(*c*) *Cheminant v. Thornton*, 2 C. & P. 51.

(*d*) *Evans v. Judkins*, 4 Campb. 156.

(*e*) *Mitchell v. King*, 6 C. & P. 237.

(*f*) *Bowen v. Owen*, 17 L. J., Q. B. 5; 11 Q. B. 135. *Robinson v.*

Ferreday, 8 C. & P. 752. *Eckstein v. Reynolds*, 7 Ad. & E. 80. *Henwood v. Oliver*, 1 Q. B. 409.

(*g*) *Manning v. Lunn*, 2 C. & K. 13. *Scott v. Uxbridge & Rickmansworth Ry. Co.*, L. R., 1 C. P. 596; 35 L. J., C. P. 292. *Sweny v. Smith*, L. R., 7 Eq. 324. 38 L. J., Ch. 446.

(*h*) *Laing v. Meader*, 1 C. & P. 217. *Richardson v. Jackson*, 8 M. & W. 298.

debtor demands a receipt for the sum which he pays, and if this be refused, retains the money, he will thereby (though always ready to pay it on those terms) lose the benefit of his tender. But the authorities seem to go in this direction. If, however, a tender be refused on some objection quite distinct from the manner in which it was made, as for the insufficiency of the sum or any similar ground; objections arising from the form of the tender are considered as waived, and cannot afterwards be insisted upon." 2 *Parsons on Contracts*, 644; and see *Wood v. Hitchcock*, 20 Wend. 479.

several joint creditors is a good tender to all. (i) A tender to a clerk or servant having a general authority to receive money for his master or employer is a good tender to the latter. (k) When a solicitor, by command of the creditor, writes for the debt, directing it to be paid to him, the solicitor, at his office, by a day named, tender of the money to any person found in possession of the office will, in general, be sufficient. (l) And if the solicitor demands payment of the cost of his letter, which is refused, and a writ is issued, the writ may be set aside. (m) A tender to an executor may be good, although he has not proved the will, provided he afterwards proves the will, and takes upon himself the burden of administration. (n)¹

(i) *Douglas v. Patrick*, 3 T. R. 683. & P. 454; M. & M. 239. *Barrett v.*

(k) *Moffat v. Parsons*, 5 Taunt. Deere, Id. 200.

308.

(m) *Holmar v. Stevens*, 33 Law T.

(l) *Watson v. Hetherington*, 1 C. R. 143. *Caine v. Coulton*, 1 H. & C.

& K. 36. *Kirton v. Braithwaite*, 1 768; 32 L. J. Ex. 97.

M. & W. 312. *Wilmot v. Smith*, 3 C. (n) 1 Eq. Cas. Abr. 319.

¹ But see *Wood v. Hichcock* (20 Wend. 47), as to the demand of a receipt and its effect upon a tender, and see particularly as to tender, *Lang v. Waters*, 47 Ala. 627; *Myers v. Byington*, 34 Iowa, 205; *Nelson v. Robson*, 17 Minn. 284; *Wooten v. Sherrard*, 68 N. C. 334; *Bohn v. Broadhagen*, 2 Cin. (Ohio) 2; *Lacy v. Wilson*, 24 Mich. 479; *Englander v. Rogers*, 41 Cal. 420; *Hallowell v. Howard*, 13 Mass. 235; *Moody v. Maharin*, 4 N. H. 296; *Warren v. Mains*, 7 Johns. 476; *Ball v. Stanley*, 5 Yerger, 199; *Wheeler v. Knaggs*, 8 Ohio, 172; *Brown v. Dysinger*, 1 Rawle, 108; *Snow v. Perry*, 9 Pick. 542; *Towsen v. Havre de Grace Bank*, 6 Har. & J. 47; *Gilmore v. Holt*, 4 Pick. 258; *Southworth v. Smith*, 7 Cush. 391; *Veazy v. Harmony*, 7 Greenl. 91; *Wyman v. Winslow*, 2 Fairf. 398; *Leballister v. Nash*, 24 Me. 316; *Bates v. Churchill*, 32 Id. 31; *Bates v. Bates, Walker*, 401; *Newton v. Galbraith*, 5 Johns. 119; as to tender of goods see *Dennett v. Short*, 7 Greenl. 150; *Elkins v. Parkhurst*, 17 Vt. 105. If the law requires the article to be packed in a certain manner (*Clark v. Pinney*, 7 Cowen, 681). A contract to deliver good

358. *Apportionment of periodical payments.*—

By the apportionment act, 1870, (o) all periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), are, like interest on money lent, to be considered as accruing from day to day, and are made apportionable in respect of time accordingly. The apportioned part is payable, in the case of a continuing payment, when the entire portion becomes due; and, in the case of a payment determined by death or otherwise, when the entire portion would have become due. (p) But the act does not extend to annual sums made payable in policies of assurance of any kind; (q) nor to cases in which it is expressly stipulated that no apportionment shall take place. (r)

(o) 33 & 34 Vict. c. 35.

(q) Sect. 6.

(p) Sect. 3.

(r) Sect. 7.

coarse salt is fulfilled by a delivery of coarse salt of a medium quality of the kind generally used at the place and time of delivery (*Goss v. Turner*, 21 Vt. 437). In *Crane v. Roberts* (5 Greenl. 419), there was a contract to deliver such hay as B should say was "merchantable." That which he did deliver, B. called "a fair lot, say merchantable, not quite so good as I expected; the outside of the bundles some damaged by the weather."—Held, no compliance with the contract (2 Parsons on Contracts, p. 655).

SECTION II.

DISCHARGE BY CONSENT OF THE PARTIES.

359. *Dispensing with performance.*—It is competent to the parties to a parol contract to dispense, by word of mouth, with performance of the contract. Thus, if a written contract for the sale of goods provides for the transmission of the goods to the purchaser on a particular day, and the purchaser subsequently gives a verbal order for them to be sent a day later, performance of the original written contract as to the time of delivery is thereby dispensed with, so that the liability upon a contract in writing may be wholly or partially discharged before breach by a subsequent verbal agreement, (s) unless the written contract is required to be in writing by the statute of frauds, in which case it cannot be varied by any subsequent agreement by word of mouth only. (t) There is, however, no clause in the statute of frauds requiring the dissolution of a contract to be in writing; and it should seem that a contract required by the statute to be in writing may, before breach, be waived and abandoned by a new agreement not in writing, so as to prevent either party from recovering upon the contract which was in writing; (u) but the substituted executory contract must be a valid contract; and, if it is of such a nature as to require authentication by writing, it must be so

(s) *Stead v. Dawber*, 10 Ad. & E. 65; 2 P. & D. 452, adopting the language of *Goss v. Ld. Nugent*, 5 B. & Ad. 65.

(t) *Noble v. Ward*, 4 H. & C. 149 L. R., 2 Ex. 135; 36 L. J., Ex. 91.

(u) *Goss v. Ld. Nugent*, 5 B. & Ad. 66.

authenticated. (x) A waiver of a stipulation in an agreement must, to be effectual, be made intentionally, and with knowledge of the circumstances. Where a written agreement exists, and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for the written agreement, he must clearly show not merely his own understanding, but that the other party had the same understanding. (y)

360. Renunciation of a contract by one party amounting to dispensation of performance by another party.—If A. has agreed to have a steam-vessel at a named port by a day specified, and there to take on board and carry a cargo to a particular destination, and B. has agreed to have a cargo in readiness for shipment at the time and place appointed, and A., before the time arrives, repudiates the contract, and declares that he will not receive the cargo, B. may treat this as a dispensation of performance of his part of the agreement, and may henceforth engage another vessel. (z) Where a manufacturer, by a contract of sale had agreed to manufacture and deliver to a purchaser certain goods and chattels by a day certain, and the purchaser, before the time appointed for delivery, told the manufacturer he need not manufacture them, as he had no occasion for them, and would not accept or pay for them, performance by the manufacturer was held to have been dispensed with. (a) So, where a farmer undertook to supply a stable-keeper with wheat-straw for a specified time, at a specified price per load, to be delivered at the rate of

(x) *Moore v. Campbell*, 10 Exch. 323. *Noble v. Ward*, *supra*.

(y) *Darnley (Earl) v. L., C., & Dover Ry. Co.* 36 L. J., Ch. 404; L. R., 2 H. L. 43.

(z) *Danube & Black Sea Rail. Co. v. Xenos*, 11 C. B., N. S. 152; 31 I.

J., C. P. 84, 284; 13 C. B., N. S. 825. *Hochster v. De La Tour*, 2 El. & Bl. 693.

(a) *Cort v. Ambergate, &c.*, 17 Q. B. 127; 20 L. J., Q. B. 460. *Ripley v. McClure*, 4 Exch. 345; 18 L. J., Ex. 419.

three loads in a fortnight, and nothing was said as to the time of payment, it was held to be an implied term or condition of the contract that each load should, if required, be paid for on delivery, and that, the stable-keeper having refused so to pay, the farmer was not bound to supply any more straw after such refusal. (b) But a neglect or refusal by one party to fulfill his part of the contract will not release the other from his engagement, unless such neglect or refusal operates as an entire frustration of the whole contract. (c)¹

361. Powers of revocation and defeasance of contracts.—Where two or more persons enter into a contract of a continuing nature, one of them cannot by his own act discharge himself from liability, and put an end to the contract, without the consent of the other, unless there is an express power of defeasance reserved to him. Where two railway companies mutually agreed for the running of their engines and carriages over each others' lines, and neither company reserved to itself the power of putting an end to the contract by notice or otherwise, it was held that the contract was binding upon both companies forever, and could not be varied against either party without the consent of that party. (d) Where one party agreed to furnish iron to another, to be delivered as required, it was held that the party who had thus agreed to furnish the iron could not put an end to the contract and refuse to supply the iron on the ground that the other party had not within a reasonable time

(b) Withers v. Reynolds, 2 B. & Ad. 882.

(d) Gt. Northern Rail. Co. v. Manch., Sheff., &c. Rail. Co., 18 Law

(c) Jonassohn v. Young, 4 B. & S. 299; 32 L. J., Q. B. 385.

T. R. 344.

¹ Bradley v. King, 44 Ill. 339; Pope v. Machias, &c. Co., 52 Me. 535; Blood v. Shannon, 29 Cal. 393; Bersch v. Sander, 29 Cal. 393; Swan v. Nichols' Admr. 24 Ind. 199.

required him to furnish iron ; that he ought in the first instance to inquire of the other if he meant to have the iron, and require him to give the order, and then, if the order was not given within a reasonable time, he might abandon the contract. (e) Parties may, by mutual assent and agreement, reserve to themselves the power of putting an end to the contract, by notice or otherwise, at any particular period, or upon the happening of any given event. When the contract is made defeasable by notice, the notice is good although the party on whom it is served is insane. (f) When a party has reserved to himself the power of annulling a contract under certain contingencies, the courts will not permit the power to be exercised for the purpose of perpetrating a downright fraud ; but there must be a clear want of bona fides on the part of the person exercising the power to warrant the interference of the court. (g)

362. *Of the release and discharge of covenants before breach.*—Covenants under seal could not, at common law, be discharged before breach by parol contract, whether executory or executed. (h) Neither could performance of a covenant be waived by parol at common law. Thus, where a tenant covenanted to yield up, at the expiration of his term, all erections and improvements upon the demised premises, and after the granting of the lease offered to erect a greenhouse, provided the landlord would permit him to remove it at the expiration of the term, and the landlord, by letter, promised so to do, and the greenhouse

(e) *Jones v. Gibbons*, 8 Exch. 920.

(f) *Robertson v. Lockie*, 15 Sim. 286.

(g) *Page v. Adam*, 4 Beav. 269.
Roberts v. Wyatt, 2 Taunt. 268.

Turpin v. Chambers, 30 L. J., Ch. 470; 29 Beav. 104.

(h) *Spence v. Healey*, 8 Exch. 668.
Thames Iron Works & Ship Building Co. v. Royal Mail Steam Packet Co., 31 L. J., C. P. 169; 13 C. B., N. S. 358

was built, and the landlord died, and the tenant removed the greenhouse at the expiration of the term, it was held that the parol license could not operate as a discharge of the covenant, and that the tenant was responsible for the breach thereof. (*i*) But the liabilities upon a deed might, in equity, be diminished, and the effect of the contract controlled and altered, by collateral letters and writings not under seal; (*k*) and a parol license or dispensation may now be pleaded as a defense to an action upon the deed.

363. *Of the release and discharge of causes of action ex contractu.*—Whenever a contract, not being a bill of exchange or promissory note, had been broken, and one of the parties had become liable to an action for the breach, the cause of action could only be discharged at common law by a release under seal, or by an agreement between the contracting parties that something should be given or done on the one side and received on the other, in satisfaction and discharge of the debt or damages resulting from the breach, and by the execution or fulfillment of this agreement, by the gift or performance and acceptance of the thing agreed to be given or done, termed, in law, “an accord and satisfaction.” (*l*) But a release, or agreement amounting to a release, made upon good consideration, though not under seal, might have been enforced in equity. (*m*) And so might a representation, by the creditor, of his intention to release the debt, if acted upon by the debtor. (*n*) But “an agreement to aban-

(*i*) *West v. Blakeway*, 3 Sc. N. R. 199. Poth. Obl. No. 471–509. *Sellers v. Bickford*, 1 Moore, 460. *Thomson v. Brown*, Id. 358. *Cordwent v. Hunt*, 8 Taunt. 596; 2 Moore, 660. *Little v. Holland*, 3 T. R. 592. *Gwynne v. Davy*, 1 M. & G. 857.

(*k*) *Smith v. E. I. Co.*, 12 Jur. 367.

(*l*) 3 Hen. 6, pl. 36. *Treswaller v. Keyne*, Cro. Jac. 620. *Langden v. Stokes*, Cro. Car. 383. *Edwards v. Weeks*, 1 Mod. 262; 2 Mod. 259.

(*m*) *Taylor v. Mannors*, L. R. 1 Ch. 48; 35 L. J., Ch. 128.

(*n*) *Yeomans v. Williams*, L. R. 1 Eq. 184; 35 L. J., Ch. 283.

dor. a claim, unless there be a consideration shown, is a mere nudum pactum." Thus, if there be an ascertained and admitted debt due, and the debtor agrees to pay half the debt on receiving a discharge in full, and the creditor accordingly gives a written acknowledgment of the receipt of the money, in full of all demands, this will not discharge the remaining moiety of the debt, unless the acknowledgment is under seal, or some valid consideration has been given and received for the discharge. Where goods have been sold and delivered, and the purchaser has neglected to pay the price, the cause of action that has arisen cannot be got rid of and discharged by a mere agreement between the plaintiff and defendant that the contract of sale shall be rescinded or annulled, and the purchaser discharged from all liability thereon. (o)

364. *Oral renunciation of claims on bills and notes.*—Bills of exchange, however, which are regulated by the custom of merchants, form an exception to the general rule of law, that a cause of action once accrued could only be discharged by deed, or by accord and satisfaction; for the liability of an acceptor, though complete, might always and may still be discharged by an express renunciation, on the part of the holder, of his claim on the bill, although such renunciation be made by word of mouth only, unaccompanied with satisfaction or any solemn instrument. Thus, where the defendant, having borrowed of his father-in-law £1,000, at £4 per cent. interest, gave his promissory note for the repayment of the amount, and the father-in-law subsequently said he would make him a present of the £1,000, and got a 10s. receipt stamp, and signed a receipt for the £1,000 and interest, and handed it to the defendant, but thereafter

(o) *Edwards v. Chapman*, 1 M. & W. 231.

made a will bequeathing the promissory note to his executors, it was held that the defendant was discharged from all liability upon the note; for that by the law merchant, there may be a release and discharge of a debt, due on a bill of exchange by word of mouth; and promissory notes are, by statute, put on the same footing as bills. (*p*)

365. *Release of one of several joint, or joint and several contractors.*—Generally speaking, a release to one of several joint, or joint and several covenantors or promisors, releases all. (*q*) Therefore, where the plaintiff, having received a sum of money from one of the parties to a promissory note, erased his name from the instrument, it was held that such erasure operated as a release to the other parties to the note. (*r*) But a party may give a qualified release, and discharge one of several joint, or joint and several, covenantors or promisors, and reserve his right of action against the others. Thus, where a release of all actions was given to one of two partners, with a proviso that it should not prejudice any claims which the releasor had against the other partners, it was held that the release did not operate as a release to the other partners. (*s*) But a creditor cannot release one of several joint debtors, and hold another liable by a reserve of remedies, (*t*) unless the original contract reserves to him the power of releasing one without discharging the others, (*u*) or unless the instru-

(*p*) *Foster v. Dawber*, 20 L. J., Ex. 385; 6 Exch. 839. *Willes, J., Cook v. Lister*, 13 C. B., N. S. 593; 32 L. J., C. P. 121.

(*q*) *Bac. Abr. RELEASE G. Co. Litt. 232. Lacy v. Kinaston*, 1 Ld. Raym. 670. A different rule prevails in the French Law. *Poth. OBLIGATIONS*, No. 581-585.

(*r*) *Nicholson v. Revill*, 4 Ad. & E. 675. *Cheetham v. Ward*, 1 B. & P. 633. *Webb v. Hewitt*, 3 Kay & J. 442

(*s*) *Solly v. Forbes*, 2 Brod. & B. 38; 4 Moore, 450. *North v. Wakhfield*, 13 Q. B. 541.

(*t*) *Cheetham v. Ward*, 1 B. & P. 633.

(*u*) *Union Bank of Manchester v. Beech*, 3 H. & C. 672; 34 L. J., Ex. 133

ment of release can, by reason of the context, be construed, as it generally will, as a covenant not to sue (*x*) not amounting to a release of the action, but giving rise only to a cross claim for damages in case of breach. (*y*) A composition-deed under the bankrupt acts, releasing all the claims of the creditors against the debtor, does not operate to deprive non-assenting creditors of their remedy against a co-debtor. (*z*)

366. General releases.—A general release of all claims and demands, will operate as a discharge and extinguishment of every known cause of action that existed at the date of the release; (*a*) but it no longer has the extensive operation which it formerly had at common law, and will not now extend to matters of which the releasor was entirely ignorant at the time he executed the release, and to which the instrument was never intended to extend; (*b*) and it may be restricted by the language of the recitals or of other parts of the deed. (*c*) A receipt in full of all demands does not necessarily amount to a release. (*d*) The operation of a release is, of course, confined to debts and demands and causes of action which have actually accrued and become vested in the releasor at the date of the release, and does not extend to any contract which has not then been broken. (*e*) Any renuncia-

(*x*) Parke, B., *Kearsley v. Cole*, 16 M. & W. 136. *Price v. Barker*, 24 L. J., Q. B. 133. *Green v. Wynn*, 38 L. J., Ch. 76.

(*y*) *Ford v. Beech*, 11 Q. B. 852, 871. *Willis v. De Castro*, 27 L. J., C. P. 246.

(*z*) *Andrew v. Macklin*, 34 L. J., Q. B. 89; 6 B. & S. 201.

(*a*) *Tynan v. Bridges*, Cro. Jac. 300. Co. Litt. 291, b.

(*b*) *Lyall v. Edwards*, 6 H. & N. 337; 30 L. Ex. 193.

(*c*) *Haselgrove v. House*, 6 B. & S. 975; 35 L. J., Q. B. 1; L. R., 1 Q. B. 101. *Gresty v. Gibson*, L. R., 1 Ex. 112; 35 L. J., Ex. 74.

(*d*) *Lee v. Lancashire & Yorkshire Rail. Co.*, L. R., 6 Ch. 537.

(*e*) *Best, C. J.*, *Radburn v. Morris*, 1 M. & P. 654. *Neale v. Sheffield*, Yelv. 192. *Payler v. Homersham*, 4 M. & S. 423. *Lambourne v. Cork*, 1 D. & R. 211.

tion under seal of the benefit of a contract, or a covenant not to sue upon it, or an acknowledgment that the contract has been rescinded or discharged will, if properly authenticated, operate as a release. (*f*) But the operation of a release may be controlled or qualified by a written undertaking or agreement not under seal. (*g*)¹

367. Conditional release.—A release may be conditional on the payment of money within a specified time, and in that case it must be shown that the

(*f*) See *Hickmot's Case*, 9 Co. 52 b,
as to covenants not to sue.

(*g*) *Cocks v. Nash*, 9 Bing. 341; 4
M. & Sc. 162. *Baker v. Head*, 20 L.
J., Ex. 444.

¹ A release must be positive in its terms, and the whole of it must be considered together. "No special form of words is necessary, if it declare with entire distinctness the purpose of the creditor to discharge the debt and the debtor. And if it have necessarily this effect, although the purpose is not declared, it will operate as a release; as in case of a covenant never to sue, or not to sue without any limitation of time; whereas, if a covenant not to sue for a certain time be broken by an action, the covenant is no bar, and the covenantee has no remedy but on the covenant. By some courts this last rule is held not to apply to actions of assumpsit, a covenant not to sue for a time certain being there a bar during that time. So, if the covenant not to sue for a time, gives a forfeiture in case of breach, it is said to be a bar. And a bond or covenant to save harmless and indemnify the debtor against his debt, is a release of the debt." 2 *Parsons on Contracts*, p. 714; and see *Cuyler v. Cuyler*, 2 Johns. 186; *Jackson v. Stackhouse*, 1 Cowen, 122; *White v. Dingley*, 4 Mass. 433; *Sewall v. Sparrow*, 16 Id. 24; *Reed v. Shaw*, 1 Blackf. 245; *Garnett v. Macon*, 6 Call, 308; *Clark v. Russell*, 3 Watts, 213; *Dow v. Tuttle*, 4 Mass. 414; *Chandler v. Herrick*, 19 Johns. 129; *Berry v. Bates*, 2 Blackf. 118; *Aloff v. Scrimshaw*, 2 Salk. 573; *Hoffman v. Brown*, 1 Halst. 429; *Perkins v. Gilman*, 8 Pick. 229; *Gibson v. Gibson*, 15 Mass. 112; *Culham v. Valentine*, 11 Pick. 159; *Winans v. Huston*, 6 Wend. 471; *Pearl v. Wells*, 6 Id. 291; *Guard v. Whiteside*, 13 Ill. 7; *Ward v. Johnson*, 6 Munf. 6; *Tuckerman v. Newhall*, 17 Mass. 581; *Clopper v. Union Bank*, 7 Harris & J. 92; *White v. Dingley*, 4 Mass. 433; *Clark v. Bush*, 3 Cowen, 151.

money has been paid, or at any rate tendered. (*h*) A release may also be subject to a condition subsequent; and in that case the release will be avoided if the condition is not complied with. (*i*)

368. *Fraudulent releases*.—Whenever a release has been fraudulently given to defeat an action, the court will set it aside, and not allow it to be pleaded. (*k*)

369. *Composition in bankruptcy*.—A composition under the bankruptcy act, 1869, is, if the requirements of the act (*l*) have been complied with, binding upon all creditors whose names and addresses, and the amount of the debts due to whom, are shown in the statement of the debtor produced to the meeting at which the resolution to accept the composition was passed; but it will not affect or prejudice the rights of any other creditors. (*m*)¹

370. *Covenants not to sue*.—Where a creditor has covenanted that he will not put his contract in suit at any time, there the covenant amounts to a release, but when the covenant is not to sue for a certain time or not to sue provided certain payments are made at specified times, (*n*) there it is only a covenant, not a release, unless it be a covenant not to sue for a limited time, with a proviso for forfeiture if an action be brought within the time, in which case it operates as a release by force of the condition, if the action be

(*h*) *Fessard v. Mugnier*, 18 C. B., N. S. 286; 34 L. J., C. P. 126.

(*i*) *Newington v. Levy*, L. R., 5 C. P. 607; *Id.* 6 C. P. 180; 39 L. J., C. P. 334; *Id.* 40 L. J., C. P. 29.

(*k*) *Sargent v. Wedlake*, 11 C. B. 732. *Payne v. Rogers*, 1 Doug. 407. *Hickey v. Burt*, 7 Taunt. 49. *Jones v. Herbert*, *Id.* 421. *Manning v. Cox*, 7 Moore, 617. *Barker v. Richardson*, 1 Y. & J., 362. *Rawstone v.*

Gandell, 15 M. & W. 305. *Morrison, Ex parte*, *In re Clunn*, 33 L. J., Bk. 47. *De Pothonier v. De Mattos*, E. B. & E. 461; 27 L. J., Q. B. 260. As to a fraudulent release to deprive an attorney of his costs, see *Games, ex parte*, 53 L. J., Ex. 317.

(*l*) As to these, see sect. 126.

(*m*) Sect. 126, par. 7.

(*n*) *Ray v. Jones*, 19 C. B., N. S. 416; 34 L. J., C. P. 306.

¹ See *post*, United States Bankruptcy Act.

brought within the time. (o) Covenants not to sue have been held equivalent to a release to avoid circuity of action, *i. e.*, the absurdity of allowing A to recover against B in one action, the identical sum which B has a right to recover in another against A. But, if the parties thus opposed in interest are not the same, the principle cannot apply. If, therefore, one of two plaintiffs has covenanted not to sue for a joint debt due to them both, he is liable for a breach of covenant if both afterwards sue; but the covenant so entered into by the one cannot be treated as a release of the joint action by both. (p) "Where A is bound to B, and B covenants never to put the bond in suit against A, if afterwards B will sue A on the bond, he may plead the covenant by way of release; but if A and B be jointly and severally bound to C in a certain sum, and C covenants with A not to sue him, that shall not be a release but a covenant only, because he covenants only not to sue A, but does not covenant not to sue B; for the covenant is not a release in its nature, but only by construction, to avoid circuity of action. (q)

371. *Covenants not to sue for a limited time.*—Covenants and agreements to suspend a right of action for some specified period of time, are deemed to be contracts to forbear from suing for the time named and are consequently not pleadable in bar of an action brought contrary to the agreement, but give rise to a cross claim for the damages resulting from the creditor's suing during the time he had agreed not to sue. (r) But where a deed contains a covenant for

(o) *Ayloffe v. Scrimshire*, Carth. 63. *Deux v. Jefferies*, Cro. Eliz. 352. *Walker v. Nevill*, 3 H. & C. 403; 34 L. J., Ex. 73.

(p) *Walmeley v. Cooper*, 11 Ad. & E. 221.

(q) *Fitzgerald v. Trant*, 11 Mod. 254. *Lacy v. Kynaston*, 12 Id. 552. *Dean v. Newhall*, 8 T. R. 171. *Hutton v. Eyre*, 6 Taunt. 294.

(r) *Ford v. Beech*, 17 L. J., Q. B. 116; 11 Q. B. 866. *Webb v. Salmon*, 19

the payment of money on a particular day, subject to a proviso that no action shall be brought till after the expiration of a month, an action cannot be brought before the end of the month, as the proviso must be construed as extending the time of payment. (s) The ancient principle of law, that a right of action once existing, and by act of the party suspended for ever so short a time, is extinguished and gone forever, does not hold in all cases, as clauses of forfeiture and defeasance are frequently annexed to contracts if they are attempted to be put in suit before the expiration of a certain period, in which case the right to sue is effectually suspended for the limited time. There are also cases in the books where, a contract having been broken, and a cause of action having accrued thereon, a new contract between the debtor and creditor and additional parties, creating new rights and liabilities, has been made and accepted as a conditional accord and satisfaction and discharge of the cause of action, so that, if the new contract is carried out by the new parties, in all its integrity, the original cause of action is extinguished and gone forever; and if it is not fully carried out, the party is remitted to his original right of action upon the original contract. To the general rule of law, also, that a cause of action, once accrued, cannot be suspended, there is an exception in favor of bills of exchange and promissory notes. (t)

372. Release by novation and substitution.—The making of a new contract, and the substitution thereof in the place and stead of the original contract, before

L. J., Q. B., 34. *Thimbleby v. Barron*, 3 M. & W. 216. *Ayliff v. Scrimshire*, 1 Show. 43.

(s) *Foly (Lady) v. Fletcher*, 3 H. & N. 777; 28 L. J., Ex. 100.

(t) *Belshaw v. Bush*, 11 C. B. 201; 22 L. J., C. P. 24. *James v. Isaacs*, 12 C. B. 800; 22 L. J., C. P. 73. *Tatlock v. Smith*, 3 M. & P. 676. *Stracey v. Bank of England*, 4 Id. 639.

breach of the latter, may operate as a discharge and extinguishment of the original contract. (*u*) One deed may be substituted for another, or a simple contract may be substituted for a deed.

373. Substitution of a new contract in the place of the original contract.—By the civil law, a novation arose when a new contract was entered into with intent to dissolve a former engagement, or a new debt was substituted for an old one. The old contract or debt was held to be extinguished by the new one contracted in its stead, whence a novation was included by the civilians amongst the different modes in which obligations were extinguished and discharged. (*x*) "A novation may take place," observes Pothier, "by the intervention of a new creditor, where a debtor for the purpose of being discharged from liability to his original creditor, by the order of that creditor, contracts a new obligation in favor of a new creditor." (*y*) A second kind of novation, observes Pothier, takes place by the intervention of a new debtor, where another person becomes debtor in my stead, and is accepted by the creditor, who discharges me from the original debt. This kind of novation is called *expromission*. (*z*) "The party substituted," observes Argentré, "is commonly a debtor of the person substituting, and, in order to be liberated from the obligation to him, contracts a new one with his creditor. In this case there is a novation, both of the obligation of the person substituting, by his giving his creditor a new debtor, and of that of the person

(*u*) Taylor v. Hilary, 1 C. M. & R. 741.

(*x*) Instit. lib. 3, tit. 30, de Novatione. Cod. lib. 3, tit. 42, sect. 8. Dig. lib. 46, tit. 2, De Novationibus.

Hobson v. Cowley, 27 L. J., Ex 205.

(*y*) Pothier, OBLIGATIONS, No 549.

(*z*) Pothier, OBLIGATIONS, No 546.

substituted, by the new obligation which he contracts." (a)¹

When several persons are mutually indebted to each other, they may, by agreement amongst themselves, vary their respective liabilities, and substitute one debt in the place of another. By a mutual contract and arrangement between all the parties interested—creditor, debtor, and payee—the original debts are extinguished; and the annihilation of those debts is a sufficient consideration for the promise to pay the new debt. "If A owes B £100, and B owes C £100 and the three meet, and it is agreed between them that A shall pay C the £100, B's debt is extinguished, and C may recover that debt against A." (b)

"Although," observes Lord Tenterden, "it is a general rule of law, that a chose in action cannot be assigned, yet it has been held that, where a defined and ascertained sum is due from A to B, and an equal or larger sum is due from C to A, and the three agree that C shall be B's debtor instead of A, and C promises to pay B the amount owing to him by A, an action will lie by B against C," (c) the original debt

(a) *Argenté*, cited Poth. OBL. No. 565.

(b) *Buller, J., Tatlock v. Harris*, 3 T. R. 180.

(c) *Fairlie v. Denton*, 8 B. & C. 400. *Crowfoot v. Gurney*, 2 M. & Sc. 482. Inst. lib. 3, tit. 30, De Novatione. Cod. lib. 8, tit. 42, s. 8. Dig. 4, tit. 2.

¹ See *Lott v. Dysart*, 45 Ga. 355; *Creighton v. Vanderlip*, 1 Mon. T. 400; *Hadden v. Dimick*, 13 Abb. (N. Y.) Pr. N. S. 135; *Gibson v. Cooke*, 20 Pick. 15; *Manderville v. Welch*, 5 Wheat. 277; *Robbins v. Bacon*, 3 Greenl. 346 (2 ed. n.); *Beecker v. Beecker*, 7 Johns. 103; *Holly v. Rathbone*, 8 Id. 149; *Norris v. Hall*, 18 Me. 332; *Clement v. Clement*, 8 N. H. 472; *Bird v. Gammon*, 3 Bing. N. C. 883; *Blunt v. Boyd*, 3 Barb. 209; *Blin v. Pierce*, 20 Vt. 25; *Van Buskirk v. Hartford Fire Ins. Co.*, 14 Conn. 141; *Langley v. Berry*, 14 N. H. 82; *Giddings v. Coleman*, 12 Id. 153; *Johnson v. Thayer*, 17 Me. 401; *Legro v. Staples*, 16 Id. 252; *Adams v. Robinson*, 1 Pick. 461.

due from A to B being extinguished in favor of the new obligation ; so that, if the creditor "were to sue or issue execution against the original debtor, the latter might show that the plaintiff, on good consideration, gave up his remedy against him, and took the liability of the other instead, which, though not properly accord and satisfaction, would be a complete defense." (*d*)

Where a quantity of gin had been sold by the plaintiff to a publican, who being unable to pay for it, handed it over to the defendant, and when the plaintiff applied for payment, the publican told the plaintiff that the defendant would pay him, and the latter, happening to come into the room during the conversation, confirmed the publican's statement, and agreed to keep the gin and pay for it, and the plaintiff assented to the arrangement, it was held that there was a substitution by consent of all parties of a new contract of sale and new purchaser, in lieu of the original contract. (*e*) So, where the defendants, being indebted to T. & Co. in the sum of £768, and T. & Co. being indebted to the plaintiffs in a much larger amount, it was agreed by all of them that the defendants should pay to the plaintiffs the amount of their debt to T. & Co., it was held that the plaintiffs might maintain an action in their own name against the defendants for the amount of the debt, as all the parties interested had mutually assented to the change of liability, and the defendants had expressly agreed to pay the amount of their debt to the plaintiffs. (*f*)

In an action by two plaintiffs upon an account stated, it appeared that the defendant was indebted to

(*d*) Tindal, C. J., *Bird v. Gammon*,
5 Sc. 220.

(*f*) Wilson v. Coupland, 5 B. &
Ald. 228. Thompson v. Percival, 5 B.

(*e*) *Browning v. Stallard*, 5 Taunt.
& Ad. 925.
450.

Moor, one of the plaintiffs, in a large sum of money, and afterwards the other plaintiff was admitted a partner with Moor, and then a further debt was contracted by the defendant with the new partnership, after which an account was settled between the defendant and the two plaintiffs, and it was agreed that all the money due to Moor before his partnership with the other plaintiff should be taken into that account, and that the balance should be paid to both the plaintiffs; and it was held that the action was properly brought by them jointly. (g) But if there had been no special agreement or consent on the part of the defendant to substitute the one debt for the other, the plaintiffs would not, by reason of any agreement amongst themselves, have been entitled to join in the action. (h) But there must be a mutual agreement between all the three parties, the creditor, his immediate debtor, and the intended new debtor, for the substitution of the new debt in the place and stead of the original debt; for if that continues to subsist, there is no consideration for the new contract, and no valid substitution takes place, and the case, as regards the intended new debtor, "is no more than if I promise a stranger to whom I do not owe anything, that, if he will accept me to be his debtor for £60, I will pay it to him; yet this is but a nudum pactum, because I was not indebted to him before; and my promise to pay, if the other will receive it, is nothing but a mere voluntary promise which does not bind me at all." (i)

Where A and B were both indebted to C, and B was also indebted to A, and it was agreed between B and C only that B should take A's debt upon himself,

(g) *Moor v. Hill*, 2 Peake 10.

(i) *Forth v. Stanton*, 1 Saund.

(h) *Wilsford v. Wood* 1 Esp. 183.

211. *Thomas v. Shillibeer*, 1 M. & W. 124.

and pay the amount thereof to C, it was held that there was no substitution of the one debt for the other, as A had not assented to the arrangement, and B's liability to him still continued. (*k*) If the agreement be made between A and B, without the concurrence of C, the situation of the parties is not altered. (*l*) Argentré, observes that the assent of the three parties is essential to the validity of the arrangement; that there must be the concurrence, first, of the original debtor, who procures another debtor in his stead; secondly, of the party who enters into an obligation instead of the original debtor to the creditor; and, thirdly, of the creditor, who, in consequence of the obligation contracted by the party substituted, discharges the party substituting. "The intention of the creditor," he observes, "to discharge the first debtor, and to accept of the second in his stead, must be perfectly evident." (*m*) If, therefore, the plaintiff in these cases has not been a party to the agreement, so as to discharge his primary debtor, and the assent of B has not been obtained, so as to discharge the debt due to him from A, the plaintiff can have no right of action upon the defendant's promise to pay the money. If the consent of all the three parties is not obtained so as to work an extinguishment of the intermediate debt, the transaction amounts to what is termed by Pothier "a simple indication." "When I indicate to my creditor a person from whom he may receive payment of the money which I owe him, and to whom I give him an order for the purpose, it is merely a mandate, and neither a transfer nor novation of the debt. I remain the debtor; and the person

(*k*) *Cuxon v. Chadley*, 3 B. & C. 591. *Liversidge v. Broadbent*, 4 H. & N. 605; 28 L. J., Ex. 332.

Cockrane v. Green, 30 L. J., C. P. 97; 9 C. B., N. S. 448.

(*m*) Argentré, *Coutumes de Brît*,

(*l*) *Price v. Easton*, 4 B. & Ad. 433. liv. 40, s. 2.

designated in the order does not become so in my stead." (n) An agreement between a creditor and two joint debtors, that the sole and separate liability of one of them shall be substituted in extinguishment and discharge of the joint liability, is a valid agreement, founded on a good consideration, "as the sole security of one of two joint debtors may be more beneficial to the creditor than the joint responsibility of both." (o)

374. *Drafts and orders for money operating by way of novation and substitution.*—An order addressed by a creditor to the defendant, his debtor, given to the plaintiff, to whom such creditor is indebted, in satisfaction of his debt, and presented by the plaintiff to the defendant, and assented to by the latter, operates as a substitution of a new debt in the place of the original demand. But the mutual assent of the three parties is essential to the novation, as the original demand is not extinguished and annihilated, if the consent and concurrence of any one of the three are wanting. "When a creditor," observes Pothier, "indicates a person to whom the debtor may pay the amount of his debt, this indication is a mere mandate, which is revocable, and does not constitute any novation until it has been assented to by the debtor." By the common law, there must be not only an assent on the part of the debtor to whom the order is addressed, but there must be also the express concurrence of the person in whose favor the order is made, manifesting his assent to the change of liability. If he is not a party to the contract, the original debt is not released and extinguished; there is no novation, and can be no substitution. (p) Where a landlord,

(n) Pothier, OBLIGATIONS, No. 569.

(p) Williams v. Everett, 14 East,

(o) Lyth v. Ault, 7 Exch. 673; 21 L. J., Ex. 217.

597. Noble v. Nat. Disc. Co., 5 H. & N. 228; 29 L. J., Ex. 210. 1a

being indebted to the plaintiff, gave to the plaintiff an order upon the defendant, his tenant, to pay the plaintiff his, the landlord's, debt to the plaintiff out of the next rent that would become due, and the plaintiff transmitted this order to the defendant, but had not any communication with him upon the subject, but at the next rent-day the defendant produced the order to his landlord, and told the landlord he would pay the amount of it to the plaintiff, and then paid the difference between the amount of the order and the sum due for the rent, and thereupon obtained a receipt from the landlord for the whole amount of the rent, and the plaintiff subsequently applied to the defendant for the debt specified in the order, when the defendant refused to pay it, and the plaintiff then brought an action for the money, it was held that, as there had been no personal communication between the plaintiff and defendant upon the subject of the order, and the plaintiff had not consented to look to the defendant instead of his original debtor for the payment of the money mentioned therein, he could not maintain his action. (g) And where the plaintiff, being indebted to one Jones, gave the defendant £8 to pay Jones, and defendant gave the plaintiff a written promise to pay the money, but before he had communicated with Jones and promised to pay him the money, and before Jones had consented to look to him instead of the plaintiff for the amount, the plaintiff countermanded the order, and required the defendant to return him the money, it was held that he was entitled so to do, and that the defendant was

Justinian's Institutes, it is ordained, "Solum NOVATIONEM prioris obligationis fieri, quoties hoc ipsum inter contrahentes expressum fuerit, quod propter novationem prioris obligationis

convenerunt: alioquin et manere pristinam obligationem, et secundam et accedere."—I. lib. 3, tit. 30, § 3.

(g). Wharton 1; Walker, 4 B. & C. 163; 6 D. & R. 288.

bound to pay it back, inasmuch as he had not placed himself under any engagement with Jones to pay it to him. (r)

When, however, the debtor or the depository of the money has assented to the order, and promised the payee or remittee to hold the amount specified at his disposal, the authority to pay the money is irrevocable, the original debt is discharged, and none of the parties can then recede from the arrangement. (s) D applied to the plaintiff to lend him the sum of £70, but the plaintiff refused to advance it without security, whereupon D gave to the plaintiff an order upon the defendants, who were his debtors, to pay to the plaintiff the amount of their debts. This order was forwarded by the plaintiff to the defendants, with a request that they would acknowledge their having given him, the plaintiff, credit for it. The defendants accepted the order, and promised that they would pay all the money that they owed D to the plaintiff, and the plaintiff then advanced £70 to D. Subsequently the defendants refused to pay the amount of the debt to the plaintiff, and, an action having been brought against them by the latter in his own name, it was held that he was entitled to recover it. (t)

A sum of money being due from the defendant to a Mr. Streather, upon a balance of account, the exact amount of which had not been ascertained, Streather gave to Messrs. Solly & Sons, to whom he was largely indebted, a letter addressed to the defendant, saying: "I shall be obliged by your paying to Messrs. Isaac Solly & Sons the balance due to me for building; and their receipt shall be a sufficient discharge to

(r) *Owen v. Bowen*, 4 C. & P. R. 430. *Lacy v. McNeile*, 4 D. & 93-96. *Cobb v. Becke*, 6 Q. B. 930. R. 9. *Dickinson v. Marrow*, 14 M.

(s) *Meert v. Moessard*, 1 M. & P. & W. 719.

11. *Peate v. Dicken*, 1 C. M. & (t) *Israel v. Douglas*, 1 H. Bl. 239.

you." This letter was forwarded by Solly & Sons to defendant, inclosed in a letter from themselves, requesting "his due attention to the order." The defendant replied: "I received your letter, inclosing Mr. Streather's, and shall be happy to make the payment to you, instead of to him, as requested"; and it was held that the defendant, after his receipt and acceptance of the order, held the money mentioned therein at the disposal of Messrs. Solly, and was accountable to them, and to no one else, for the amount deposited in his hands. (*u*)

In these cases, when, by the accession and agreement of all the parties interested, the original or intermediate debt is extinguished, the promise to pay the amount thereof to a third party is not a promise to answer for the debt of another, within the statute of frauds, as no such debt exists; it is a new, original, and independent engagement, founded upon the merger and extinguishment of the pre-existing debt or demand. (*x*)

375. *Novation in the case of life assurance companies.*—By the 35 & 36 Vict. c. 41, s. 7, where a company, either before or after the passing of that act, has transferred its business to or been amalgamated with another company, no policy-holder in the first-mentioned company who shall pay to the other company the premiums accruing due in respect of his policy, is by reason of any such payment made after the passing of that act, or by reason of any other act done after the passing of that act, to be deemed to have abandoned any claim which he would have had against the first-mentioned company on due payment

(*u*) *Crowfoot v. Gurney*, 2 M. & Sc.
473. *Hutchinson v. Heyworth*, 9 Ad.
& E. 375.

(*x*) *Anstey v. Marden*, 1 B. & P. N.
R. 131.

of premiums to such company, or to have accepted in lieu thereof the liability of the other company, unless such abandonment and acceptance have been signified by some writing signed by him, or by his agent lawfully authorized.

376. *Substituted performance of something different from what was stipulated to be done.*—If the obligor of a bond has bound himself to pay £20,000 by a day named, it has been held not to be essential to the discharge of the condition and the defeasance of the bond, to show that the money was paid; but that it is enough to prevent a forfeiture for the obligor to show that, before or upon the day appointed for payment of the money, he gave to the obligee “a horse, or a cup of silver, or a ring of gold, or any such other thing, in full satisfaction of the money, and that the latter received it in satisfaction, though the horse or the other thing were not of the twentieth part of the value of the money.” (y) And where a defendant has covenanted to pay a sum of money to the plaintiff, it is competent to the defendant to show that, at the time appointed for the payment of the money, the defendant tendered to the plaintiff, and the plaintiff accepted and received, part payment in goods, in lieu of money. (z)

377. *Discharge by accord and satisfaction.*—If, before action, (a) the defendant delivers to the plaintiff, and the plaintiff accepts from the defendant, either money or chattels, or securities for money, in satisfaction and discharge of the debt or cause of action, that is a good answer to an action for a debt or for damages for a breach of contract, whether the contract be under

(y) Litt. s. 344. And see Co. Litt. 213, a. Anon., Dyer, 56, b, pl. 18.

(z) Smith v. Battans, 26 L. J., Ex.

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(a) As to accord and satisfaction after action and its effects, see Tetley v. Wanless, 36 L. J., Ex. 153; L. R.

2 Ex. 275.

seal or whether it be a simple contract, and whether the action be founded on a deed or on a parol agreement. (b) If a creditor tells his debtor that he will make him a present of the debt, and desires him to purchase a stamped receipt for the amount of the debt in full of all demands, and the debtor purchases the receipt, fills it up, and takes it to the creditor, who signs it, the purchase and payment of the paper and stamp, and the filling up of the receipt at the request of the creditor, do not amount to an accord and satisfaction of the debt. (c) To constitute acceptance, there must be an act of the will; but if the party accepts the thing, though but for a moment, in satisfaction, he cannot afterwards, by his subsequent dissatisfaction, get rid of the effect of it. (d)¹

378. *An accord executory*, or a contract to do what the party has already bound himself to perform, and has left unperformed, has been held to be no bar

(b) *Blake's Case*, 6 Co. 43, b.; 44, a.
 Bro. Abr. ACCORD, pl. 11. *Andrew*
v. Boughey, Dyer, 75, b. *Lavery v.*
Turley, 6 H. & N. 239; 30 L. J.,
 Ex. 49.

(c) *Foster v. Dawber*, 20 L. J., Ex.
 385. 6 Exch. 839.
 (d) *Hardman v. Bellhouse*, 9 M. &
 W. 600.

¹ *Frentress v. Markle*, 2 Iowa, 553; *Coit v. Houston*, 3 Johns. Cas. 243; *Watkinson v. Inglesby*, 5 Johns. 386; *Frost v. Johnson*, 8 Ohio, 393; *Woodruff v. Dobbins*, 7 Blackf. 582; *Ballard v. Noaks*, 2 Pike, 45; *Brooklyn Bank v. De Grauw*, 23 Wend. 342; *Bryant v. Proctor*, 14 B. Mon. 457; *Bigelow v. Baldwin*, 1 Gray, 245; *Babcock v. Hawkins*, 23 Vt. 561. The accord must be simultaneous, proposed by one party, and accepted by the other, and it is a question for the jury whether there has been an acceptance (*Maze v. Miller*, 1 Wash. C. C. 328; *Sinard v. Patterson*, 5 Blackf. 354; *State Bank v. Littlejohn*, 1 Dev. & Bat. 565). Every receipt is not an acceptance. To constitute an acceptance there must be an act of the will (*Brenner v. Herr*, 8 Penn. St. 106). So whether a note or bond is accepted in satisfaction of an original claim, or only as collateral security, is for the jury (*Stone v. Miller* 16 Penn. St. 450; *Hearn v. Kiehl*, 38 Id. 147).

to an action, (*e*) as where an agreement had been made between the plaintiff and defendant to submit the plaintiff's claim to arbitration, and to abide by the award, and arbitrators had been appointed, who had taken upon themselves the burden of the reference, and a reasonable time for making their award had not elapsed; (*f*) or where it was agreed between the plaintiff and defendant that the defendant should pay the plaintiff £3 and his attorney's bill, and he paid the £3, and was always ready to pay the bill, but the plaintiff never showed him the bill; (*g*) or where the defendant irrevocably constituted the plaintiff his agent to receive money due to the defendant to an amount exceeding the debt, and authorized the plaintiff to retain the debt out of such money when received, and the plaintiff might and ought to have received such money pursuant to the authority confided to him by the defendant, but did not receive it in consequence of his own default and want of care, whereby the money became wholly lost to the defendant; (*h*) or where the defendant gave, and the plaintiff accepted, an order from the defendant on some third party for the delivery of certain securities for money to be received by the plaintiff in satisfaction and discharge of the cause of action, and the securities would have been delivered to the plaintiff if he had presented the order, but the plaintiff kept the order in his hands an unreasonable time without presenting it whereby the securities became wholly lost to the defendant. (*i*) But if, by a subsequent executory simple contract, made and accepted in satisfaction of

(*e*) *Bayley v. Homan*, 3 Bing. N. C. 203. *Carter v. Wormald*, 1 Exch. 915. 86.

(*f*) *Harris v. Reynolds*, 7 Q. B. 71; 14 L. J., Q. B. 241. (*h*) *Gifford v. Whittaker*, 6 Q. B. 219.

(*i*) *Griffiths v. Owen*, 13 M. & W. 58.

(*g*) *Cock v. Honychurch*, T. Raym.

a simple contract debt or cause of action, increased liabilities are undertaken by the defendant, if an additional sum of money is agreed to be paid, or additional acts and duties are agreed to be performed, for the non-performance of which an action will lie against the defendant, or if a surrender or exchange of securities has been agreed upon, or an apportionment of property and debts, this new contract, with the remedies thereupon, will constitute a good accord and satisfaction. (*k*) The substitution, by agreement of all parties, of the separate liability of one of several persons jointly liable, may be a good satisfaction and discharge of the joint liability of the others. (*l*)

379. *Delivery and acceptance of specialty securities, or of additional simple contract securities, in satisfaction and discharge of simple contract debts and causes of action*, pursuant to the parol agreement of the parties in that behalf, constitute a good accord and satisfaction of the simple contract debt or cause of action, by reason of the superiority of the specialty security to the simple contract, provided the specialty security is co-extensive in its operation and legal effect with the antecedent simple contract, and was given and accepted in lieu thereof, and not as a collateral security. (*m*) But if the securities are accepted on the faith of a representation by the other party that they are valid and binding, and they turn out not to be so, the transaction may be repudiated in equity by the party who has been deceived. (*n*) Where a debtor by simple contract executed a deed in which he admitted the amount of his debt and secured it by an assignment of property to his creditor, but the deed

(*k*) Com. Dig. ACCORD, B. 4.

561. Yates v. Aston, 4 Q. B.

(*l*) Lyth v. Ault, 21 L. J., Ex. 217 ;

196.

7 Exch. 669.

(*n*) Stears v. South Essex Gas Co.

(*m*) Price v. Moulton, 10 C. B. 9 C B., N. S. 180 ; 30 L. J., C. P. 49.

contained no covenant or agreement to pay the debt it was held that the deed did not make the debt a specialty. (o) The delivery and acceptance of a negotiable security, in satisfaction and discharge of an existing debt, is a good accord and satisfaction, although such acceptance is for a less amount than the debt. (p) But, in the absence of any agreement to the contrary, the acceptance of a bill of exchange only suspends the remedy for a debt. (q) A bill of exchange received by one of two joint creditors will be a good satisfaction and discharge of the debt due to both, if the one creditor agrees to receive, and does receive, the bill in satisfaction and discharge of the joint debt. (r)¹

380. Composition deeds and agreements.—When creditors covenant or agree by deed to take a certain specified composition of so much in the pound on the amount of their debts, the operation of the deed as a satisfaction and discharge of the debts is in general made dependent upon the composition being paid at

(o) *Marryat v. Marryat*, 28 Beav. 224; 29 L. J., Ch. 665.

(p) *Sibree v. Tripp*, 15 M. & W. 35; 15 L. J., Ex. 318. *Curlewis v. Soward v. Palmer*, 2 Moore, 274.

(q) *London, Birmingham & South Staffordshire Bank, in re*, 34 L. J., Ch. 418; 34 Beav. 332.

(r) *Thompson v. Percival*, 5 B. & Ad. 925.

¹ The accord and satisfaction must be advantageous to the creditors (*Warren v. Skinner*, 20 Conn. 559; *Daniels v. Hatch*, 1 N. J. 391; *Smith v. Bartholomew*, 1 Metc. 276; *Greenwood v. Lidbetter*, 12 Price, 183; *Hinckley v. Arey*, 27 Me. 362; *Hardey v. Coe*, 5 Gill, 189; *White v. Jordan*, 27 Me. 370; *Eve v. Moseley*, 2 Strobbh. 203). But this rule applies only when the claim thus settled is a liquidated and undisputed one (*McDaniels v. Lapham*, 21 Vt. 223; *Stockton v. Frey*, 4 Gill, 406; *Palmerton v. Huxford*, 4 Denio, 166; *Tuttle v. Tuttle*, 12 Metc. 551; *Booth v. Smith*, 3 Wend. 66; see *Bruce v. Bruce*, 4 Dana, 530; 2 *Parsons on Contracts*, p. 686; *Coles v. Soulsby*, 21 Cal. 47; *Booth v. Smith*, 3 Wend. 66; *Webster v. Wyser*, 1 Stew. 184; *Harper v. Hampton*, 1 Harris & J. 673).

the time appointed, so that, if the debtor makes default in carrying into effect his part of the contract, the deed will not operate as a satisfaction and discharge, but the creditors will be remitted to their original rights. An agreement by simple contract on the part of a creditor, to accept a composition of so much in the pound on the amount of his debt, cannot be set up against an action of debt upon a bond or covenant; (s) for a bond or covenant, or a specialty debt, cannot be satisfied and discharged by parol agreement; and, in the case of a simple contract debt, if the agreement for the composition is only between the debtor and a single creditor, it is inoperative as a discharge of the debt, as there is no consideration for the agreement by the creditor, on receiving part of the debt, to give up the residue; (t) but if some additional security is taken, or the liability of some new party is introduced into the agreement, the case is different. (u) When some or all of the creditors join together and agree to take a portion of the debts due to them, in satisfaction and discharge of such debts, and not to sue the debtor, the joint agreement to accept the composition and relieve the debtor from his embarrassments is a sufficient consideration to each of them for the promise or agreement of each to accept the composition and discharge the debtor; (x) and, if the agreement is carried into effect by the payment and receipt of the composition, there is a good accord executed, which is pleadable in discharge of any action brought by a creditor who is a party to the composition agreement for the recovery of the residue of his debt. If, however, the composition is not paid, the

(s) *Lowe v. Eginton*, 7 Pr. 604.(u) *Steinman v. Magnus*, 11 East,(t) *Lynn v. Bruce*, 2 H. Bl. 393.(x) *Norman v. Thompson*, 4 Exch.

agreement will be a mere accord executory, producing no satisfaction of the debt, and the creditors will be remitted to their original rights; (*y*) and, when the agreement is founded on the joint assent of all the creditors, all must sign, or none will be bound thereby. (*z*)

If a debtor makes an assignment of all his property to a trustee, for the benefit of such of his creditors as shall come in and execute the deed, and any one of the creditors communicates with the trustee, and assents by word of mouth to the transaction, so as to create the relationship of trustee and cestui qui trust between himself and the trustee, the assignment cannot afterwards be revoked. (*a*) And, where the party taking the legal interest under the deed has also a beneficial interest, the property will pass to him, unless he expressly disclaims. (*b*) When the composition agreement provides additional security for the payment of the composition, beyond what the creditors previously possessed for the payment of the entire debt; if, for instance, a surety comes forward and pledges himself to the payment of the composition, or if the debtor assigns all his property to trustees, to be divided amongst his creditors, (*c*) it is for a jury to determine whether the agreement itself, with the additional security thereby provided for the payment of the composition, was accepted as a substitution for, or in satisfaction and discharge of, the original debts, or whether it was the performance of the agreement by the actual payment and acceptance of the

(*y*) *Heathcote v. Crookshanks*, 2 T. R. 24. *Garrard v. Woolner*, 8 Bing. 264; 1 M. & Sc. 336. *Shipton v. Casson*, 5 B. & C. 378.

(*a*) *Boyd v. Hind*, 25 L. J., Ex. 246.

(*a*) *Harland v. Binks*, 15 Q. B. 720.

(*b*) *Siggers v. Evans*, 5 Ell. & Bl. 377; 24 L. J., Q. B. 305.

(*c*) *Tatlock v. Smith*, 3 M. & P. 688.

composition itself, which was offered on the one side, and accepted on the other, in satisfaction and discharge. In the former case, the right to sue for the original debts would be extinguished from the time of the making of the agreement; and the remedy would be upon the agreement for the recovery of the instalment. In the latter case, there would be no satisfaction or discharge of the debts until the composition was actually paid and received. (*d*)¹

Where, by an agreement between a debtor and his creditors, the debtor was to give, and the creditors to accept, certain securities for the payment of a certain portion of the debts due to each, and the creditors were to forbear from enforcing their original demands, it was held that this was a new agreement substituted in the place of the original contracts between the debtor and his creditors, which were extinguished, and that the creditors consequently could no longer sue for their original debts. (*e*) And where a creditor signed an agreement to accept a composition of five shillings in the pound on the amount of his debt, payment of such composition to be secured by the joint note of hand of the debtor and his father, and the joint note of hand was accordingly delivered to him, it was held that this amounted to an accord and satisfaction of the original debt, and was a complete discharge of the debtor's liability in respect thereof. (*f*) If a third party comes forward, and guarantees the payment of a certain sum to creditors who execute the deed by a day named, time is of the essence of the contract, and

(*d*) *Cork v. Saunders*, 1 B. & Ald. 50.

(*e*) *Good v. Cheeseman*, 2 B. & Ad. 334.

(*f*) *Lewis v. Jones*, 4 B. & C. 506.

¹ See *Lawrence v. Neff*, 41 Cal. 566; *Maltbie v. Hotchkiss*, 38 Conn. 80; *Rowland v. Coleman*, 45 Ga. 204; *Wiltmor v. Hastings*, 51 Mo. 171.

the benefit of the deed is confined to those who execute it by the day named. (*g*)

Where the plaintiff, by his own act, has prevented the satisfaction from being made, pursuant to the terms of the accord or agreement, the accord will, as to him, be deemed to be accomplished, and that which was agreed to be done will be taken as done. (*h*) If the amount of the debt is not specified, the creditor will be bound for his actually existing debt which is capable of proof. (*i*)

381. *Transfer of property by way of accord and satisfaction.*—Where property, real or personal, is accepted in satisfaction of a debt, care should be taken so to assign the property that the transaction may not be avoided either as a fraud on the other creditors of the assignor or as an act of bankruptcy. Every transfer which is fraudulent as against creditors, is also void as against the trustee in bankruptcy. (*k*)

By the 13 Eliz. c. 5 (made perpetual by the 29 Eliz. c. 5), for the avoiding of feigned and fraudulent grants and alienations, devised to delay or defraud creditors or others of their just and lawful actions, debts, &c., it is enacted (s. 2) that every gift, grant, &c., of land, tenements, &c., goods, and chattels, or of any profit or charge out of the same, shall be from thenceforth deemed and taken, as against the person whose actions, debts, &c., shall be in anywise disturbed, hindered, or defrauded, to be void and of no effect. But nothing in the Act is to invalidate (s. 6) a conveyance made bona fide for a valuable consideration by persons having no notice of the fraud, &c.

(*g*) Williams v. Mostyn, 33 L. J., Ch. 54. Crowe v. Lysaght, 12 Ir. C. L. R. 481.

(*i*) Harthy v. Wall, 1 B. & Ald. 103.

(*k*) Reay v. White, 1 C. & M. 748.

(*k*) Doe v. Ball, 11 M. & W. 531.

Bradley v. Gregory 2 Campb. 383.

In considering whether an assignment is void under this statute, the question is, whether it was intended to have operation in favor of the claimant under it, and to confer upon him all the rights of ownership, or whether it was contrived and intended to be used for the benefit of the grantor. (*l*) The mere intention to defeat an execution creditor does not in itself constitute a fraud; the question is, whether there was a bona fide intention on the part of both parties to transfer the property in reality, or whether the transaction was only colorable, and it was secretly intended that the grantor should preserve his dominion over the property, using the assignment as a mere pretext to keep off creditors. (*m*)

382. Effect of the absence of a valuation or appraisal.—If there has been no proper valuation or appraisal of the property, prior to the assignment, this is a circumstance from which it may be inferred that the transfer was not meant to be a real one. (*n*)

383. Inadequacy of price.—If the purchase-money, or consideration for the transfer, appears to be wholly inadequate, this is a badge of fraud; (*o*) but a sale at a low price is not on that account alone necessarily fraudulent. (*p*) Where the defendant was indebted to Twyne in £400, and to the plaintiff in £200, and, pending the plaintiff's action, the defendant made a general deed of gift of all his goods and chattels to Twyne in satisfaction of his debt, but, nevertheless, continued in possession of the said goods and chattels, and dealt with them as his own, and the plaintiff after-

(*l*) Rolfe, B., *Everleigh v. Pursford*, 2 Mood. & Rob. 542. *Martin v. Podger*, 2 W. Bl. 700.

(*m*) *Wood v. Dixie*, 7 Q. B. 896. *Hale v. Metropolitan Saloon*

Omnibus Company, 28 L. J., Ch. 777.

(*n*) *Twyne's Case*, *post*, p. 284.

(*o*) *Dewy v. Bayntun*, 6 Exch. 284

(*p*) *Lee v. Hart*, 10 Exch. 560.

wards recovered judgment against the defendant and issued execution, and the question was, whether the deed was fraudulent under the statute of 13 Eliz. c. 5, it was resolved that it had signs and marks of fraud;—

1. Because it was a general grant of all his chattels without excepting wearing apparel or things of necessity; for it is commonly said *quod dolosus versatur in generalibus*. 2. The grantor continued in possession and used the goods as his own, and by reason thereof traded and trafficked with others. (q) 3. It was made in secret; *et dona clandestina sunt semper suspiciosa*. 4. It was made pending the writ. 5. There was a trust between the parties; for the donor possessed all, and used them as his proper goods; and trust is the cover of fraud. Secondly, it was resolved that, notwithstanding there was a true debt due to Twyne, and a good consideration for the gift, yet it was not within the proviso of the Act of Elizabeth, saying that the Act shall not extend to any estate or interest in goods and chattels made on good consideration and *bona fide*; for, although it is on a true and good consideration, yet it is not *bona fide*; for no grant shall be deemed *bona fide* within the said proviso which is accompanied with a trust. As, if a man be indebted to five several persons in the several sums of £20, and hath goods of the value of £20, and makes a gift of all his goods to one of them in satisfaction of his debt, but there is a trust between them that the grantee shall deal favorably with him in regard of his poor estate, either to permit the grantor, or some other person for him or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able, this shall not be called *bona fide* within the said proviso; and so a

(q) *Paget v. Perchard*, 1 Esp. 204.

good consideration does not suffice, if it be not also bona fide. And, therefore, when any grant of goods is made in satisfaction of a debt by one who is indebted to others, it should be made in the presence of witnesses, and the goods should be appraised to their full value, and possession taken of them after the execution of the deed of grant. (r)¹

384. *Transfer of possession.*—Where goods are accepted in satisfaction of a debt, the creditor can never be secure that the action will not be avoided, unless he takes possession of them. As against execution creditors of the debtor, the assignment will be void unless it is registered under the 17 & 18 Vict. c. 36, where registration is required by the Act;

(r) *Twyne's Case*, 3 Co. 80; 1 *Smith's L. C. 1.*

¹ If the consideration is valuable, it need not be adequate; courts will not inquire into the exact proportion between the value of the consideration (*Hubbard v. Coolidge*, 1 Metc. 84; *Whittle v. Skinner*, 23 Vt. 532; *Sanborn v. French*, 2 Foster (N. H.) 246; *Harlan v. Harlan*, 20 Penn. St. 303; *Davidson v. Little*, 22 Id. 245). But it must have some real value; and if this be very small, this circumstance may, even by itself, and still more when connected with other indications, imply or sustain a charge of fraud (*Johnson v. Dorsey*, 7 Gill. 269; *Wormack v. Rogers*, 9 Geo. 60; *Judge v. Wilkins*, 19 Ala. 765; *Milnes v. Cowley*, 8 Price, 620; *Mayor v. Williams*, 6 Md. 235). Courts will not disturb contracts on questions of mere adequacy, whether the consideration is of benefit to the promisor, or of injury to the promisee. But if an agreement be unreasonable or unconscionable, but not in such a way or to such a degree as to imply fraud, courts of equity will not decree a specific performance (1 *Parsons on C.* 437; *Osgood v. Franklin*, 2 Johns. Ch. 23). Adequacy of consideration is a question for the court. 1 *Parsons on C.* p. 437; and see *Cabot v. Haskins*, 3 Pick. 83; *Callaghan v. Hallett*, 1 Caines, 104; *Sweany v. Hunter*, 1 Murphey, 181; *Smith v. Bartholomew*, 1 Metc. 276; *L'Amoureux v. Gould*, 3 Seld. 349; *Warder v. Tucker*, 7 Mass. 449; *Freeman v. Boynton*, Id. 483; *May v. Coffin*, 4 Id. 347; *Silvernail v. Cole*, 12 Barb. 685; *Ross' Ex'r v. McLauchlan's Adm'r*, 7 Gratt. 86.

(s) while if the debtor should become bankrupt, the trustee will be entitled to them, as being in the order and disposition of the bankrupt with the consent of the true owner. Where there is no assignment in writing requiring registration, the fact that the debtor remains in possession of the goods is a strong mark of fraud, unless the transfer of the property is so notorious as to rebut the presumption of fraud; (t) for where the transaction is perfectly notorious, so that the continuance of possession of the property does not create any false credit in the neighborhood, the mere continuance of possession is not necessarily fraudulent. (u)

385. Avoidance of a transfer as a fraudulent preference.—An assignment of real or personal property in satisfaction of a debt may be avoided as a fraudulent preference in the same way as a payment may be avoided on that ground. (x) But an assignment made under pressure from the creditor, and not by the mere voluntary act of the debtor, was not a fraudulent preference under the old law; and the bankruptcy act of 1869, sect. 92, does not avoid, as a fraudulent preference, an act which was not such before. (y) And in order to avoid a transfer as a fraudulent preference, there must be fraud in fact; an assignment under pressure, and without fraud or intention to prefer, cannot be avoided as a fraudulent preference.¹

(s) See the provisions of the Act, 254. *Kidd v. Rawlinson*, 2 B. & P. post, bk. 2, ch. 5, sect. 1. 60. *Watkins v. Birch*, 4 Taunt. 822.

(t) *Latimer v. Batson*, 4 B. & C. 654; 1 *Smith's Lead. Cas.* 5th ed. 12, 13. *Jezeph v. Ingram*, 8 Id. 843. (x) *Anie*, pp. 400, et seq. (y) *Tempest. ex parte*, L. R., 6

(u) *Leonard v. Baker*, 1 M. & S. Ch. 70.

¹ See *Re Shea*, 2 Biss. 156; *Winter v. Iowa, &c. R. R. Co.*, 2 Dill. 487; *Re Thompson*, 2 Biss. 166; *Re Clemens*, 2 Dill. 533; *Gibson v. Warden*, 14 Wall. 244; *Traders' Bank v. Campbell*, Id. 87; *Catlin v. Foster*, 1 Sawyer, 37.

386. *Transfers void as an act of bankruptcy.*—It is not necessary that an assignment should be fraudulent, in the strict sense of the term, in order to make it an act of bankruptcy. It is sufficient, if the necessary effect of it is so to cripple the resources of the trader as to produce insolvency, and deprive him of the present power of satisfying his creditors. A conveyance made by a trader of his property, which, by its consequences, disables him from carrying on his business, whether made with a view to satisfy a present, or indemnify a future, creditor, or for what purpose soever made, has always been held to be an act of bankruptcy, and to be void against creditors, because it destroys all means of satisfying their debts; (*z*) and a conveyance by a trader, necessarily delaying his creditors, is an act of bankruptcy, though it has not the effect of stopping his trade, and although there be a substantial surplus which may prevent the deed from ultimately defeating the creditors. (*a*) But an assignment under pressure, not of the whole of the property, but with a substantial exception, is not an act of bankruptcy; (*b*) and although there be an assignment of a man's whole stock-in-trade, yet if he has the means of carrying on other business, and the assignment does not produce actual insolvency and delay his creditors, it is not an act of bankruptcy. (*c*) And where there is no intention at the time on the part of the debtor or his creditor to convey away all the property,

(*z*) *Hooper v. Smith*, 1 W. Bl. 442. *Law v. Skinner*, 2 Id. 996. *Bland, ex parte*, 6 De G. M. & G. 761. *Lacon v. Liffen*, 32 L. J., Ch. 315. *Topping v. Keysell*, 16 C. B., N. S. 258; 33 L. J., C. P. 225. *Young v. Fletcher*, 3 H. & C. 732; 34 L. J., Ex. 154. *Goodricke v. Taylor*, 2 De G. J. & S. 135.

(*a*) *Smith v. Cannon*, 2 Ell. & Bl. 35. *Wensley, ex parte*, 1 De G. J. & S. 273; 32 L. J., Bk. 23. *Young v. Fletcher*, 3 H. & C. 732; 34 L. J., Ex. 154.

(*b*) *Smith v. Timms*, 1 H. & C. 849. 32 L. J., Ex. 215.

(*c*) *Young v. Waud*, 8 Exch 221.

although it afterwards turns out that that is the effect of what has been done, there is no fraudulent conveyance within the meaning of the bankruptcy act, 1869 sect. 6, sub-sect. 2. (*d*)¹

387. Accord and satisfaction with one of several joint plaintiffs.—We have already seen that, where several persons are joined together in suing upon a joint cause of action, all are bound by the act of one; and therefore a satisfaction to one of several joint plaintiffs of the joint cause of action in respect of which they sue, is, in general, a satisfaction to all, whether made before or after the commencement of the action. (*e*) So, a man may pay a debt to one of several persons with whom he has contracted jointly; and the inability of bankers so to discharge themselves arises from the particular contract which exists between them and their customers. (*f*)

(*d*) *Philips v. Hornstedt*, L. R., 8 Ex. 26.

(*f*) *Husband v. Davis*, 10 C. B. 645; 26 L. J., C. P. 118. *Foley v.*

(*e*) *Wallace v. Kelsall*, 7 M. & W. 264.

Hill, 2 H. L. Cas. 28.

¹ *Re McGie*, 2 Biss. 163; *Buchanan v. Smith*, 16 Wall. 277; *Hood v. Harper*, 8 Phil. (Pa.) 160; *Cobb v. Hale*, 10 Blatchf. 56; *Markson v. Holson*, 2 Dill. 327; *Dumming v. Perkins*, 2 Biss. 121.

SECTION III.

DISCHARGE BY OPERATION OF LAW.

388. *Alterations of contracts in writing. (g)*—If a deed, after it has been signed, sealed, and delivered, or a simple contract in writing, after it has been finally completed and signed, is altered in any material part, with the privity and assent of the parties to it, a fresh contract is created, which puts an end to the first contract. (*h*) If, after a party has signed his name to a contract, he makes an interlineation to correct a mistake, or add a new term, it is not necessary for him to re-sign the contract. (*i*) And a contract in writing, which is sufficient within the statute of frauds, cannot be invalidated or affected by a subsequent abortive attempt to put it into a more formal shape. (*k*) If the alteration, whether it be by interlineation, addition, drawing a line through the words, or writing new letters on the old, has been made without the consent of the parties against whom the contract is sought to be enforced, either by the plaintiff who sues upon the contract, or by some other person whilst the contract was in the custody or possession of the plaintiff, the alteration will discharge the original contract without substituting any fresh contract in its place. But if the alteration has been made by the defendant, or some third party, without the plain-

(*g*) As to alterations in bills and notes, see *post*, bk. 2, ch. 6, s. 1.

(*h*) Pigot's Case, 11 Co. 27, a.

(*i*) Bluck v. Gompertz, 7 Exch. 862.

(*k*) Heyworth v. Knight, 17 C. B. N. S. 298; 33 L. J., C P. 298.

tiff's consent, whilst the contract was out of the plaintiff's hands, the alteration will have no effect; and the contract will remain as it originally stood, provided the nature and extent of the alteration can be clearly ascertained, and it can be seen what the contract was at the time it was executed. (*l*) If the alteration is of such a nature as to render this a matter of doubt the contract is extinguished and destroyed as effectually as if the writing had been obliterated. (*m*) But it is not every alteration of a contract in a material particular that will avoid or nullify it. The erasure, for example, of the name of a shareholder from a deed of settlement of a joint-stock company does not prevent the deed from being evidence that another person, whose name is not erased, is a shareholder of the company. (*n*)

The following alterations and additions to simple contracts, made without the privity and assent of the parties sued thereon, have been held to discharge the contract:—viz., the affixing of a seal to the defendant's signature of a simple contract, whilst the contract is in the possession or under the control of the plaintiff, so as to give the contract the character and appearance of a deed, (*o*)¹ the striking out of the body of a policy of insurance the time of the warranty of sailing, and inserting in the margin of the policy a different time of sailing without the sanction of the underwriter, after the policy has been subscribed by him; (*p*) the

(*l*) *Waugh v. Russell*, 5 Taunt. 710. *Hemming v. Treneery*, 9 Ad. & E. 934. *Henfrec v. Bromley*, 6 East, 310. *Raper v. Birkoeck*, 15 Id. 17.
(*m*) *Davidson v. Cooper*, 13 M. & W. 352. *Crookewit v. Fletcher*, 1 H. & N. 913; 26 L. J., Ex. 153.

(*n*) *Agricult. Cat. Ins. Co. v. Fitzgerald*, 16 Q. B. 432; 20 L. J., Q. B. 244.

(*o*) *Davidson v. Cooper*, 13 M. & W. 352.

(*p*) *Fairlie v. Christie*, 7 Taunt. 416.

¹ But this is questioned by 1 *Parsons on Contracts*, p. 721.

insertion in a broker's bought and sold note, either by the vendor himself, or by the broker at his request, after the notes have been exchanged, of a stipulation to the effect that damaged articles are to be taken at a valuation, (*q*) or that the things sold are to be of the vendor's own manufacture. (*r*)

389. Immaterial alterations.—But, whenever the alteration is immaterial, the contract is not vitiated. Thus, where a house was, by mistake, described as No 38, whereas it was in fact No. 35, and the 8 was altered into a 5 whilst the lease was in the plaintiff's hand, it was held that the contract was not avoided by the alteration. (*s*) A bond, remaining in the hands of the agent of the obligor as an escrow, is not avoided by the addition of another obligor, with the assent of the agent, before the delivery of the instrument to the obligee. (*t*) And, when a deed inter partes is in progress of execution, and an alteration is made to meet the wishes of the parties who are about to execute it, such alteration, if it does not alter the operation of the deed with respect to the parties who have previously executed it, will not avoid the deed. (*u*)¹

(*q*) *Powell v. Divett*, 15 East, 29.

(*r*) *Mollet v. Wackerbath*, 5 C. B. 191; 17 L. J., C. P. 47. As to alterations in bills and notes discharging the contract, see *post*, bk. 2, ch. 6, s. 1.

(*s*) *Hutchins v. Scott*, 2 M. &

W. 816. *Sanderson v. Symonds*, 4 Moore, 46.

(*t*) *Matson v. Booth*, 5 M. & S. 226. *Hudson v. Revett*, 2 M. & P. 691.

(*u*) *Doe v. Bingham*, 4 B. & Ald. 676. *Hall v. Chandless*, 12 Moore, 316; 4 Bing. 123.

¹ But see *Pequawket Bridge v. Mathes*, which held that an immaterial alteration of a bond, though made by the obligee, would not destroy the bond. And see to the same effect, *Bowers v. Jewell* (2 N. H. 543); *Nichols v. Johnson* (10 Conn. 192). Where a mortgagor altered a mortgage after it was signed by his co-mortgagor, without the knowledge or consent of such co-mortgagor, by inserting the description of additional property, it was held, that the mortgage was valid

390. Evidence to explain alterations. — It lies upon the party suing upon an altered contract to account for any material alteration that appears upon

as to both mortgagors as a conveyance of the property therein described before the alteration was made; and that the party who made the alteration was bound by it as a conveyance of all the property embraced both in the original mortgage and in the alteration (*Van Horn v. Bell*, 11 Iowa, 465; and see *Wright v. Wright*, 2 Halst. 175; *Boalt v. Brown*, 13 Ohio St. 364; *Field v. Slagg*, 32 Mo. 534; *Upton v. Archer*, 41 Cal. 85; *Clark v. Allen*, 34 Iowa, 190). But trivial clerical errors in a sheriff's deed, in regard to the recital of publication of sale, are insufficient to invalidate the deed (*Matney v. Graham*, 50 Mo. 559). It seems to be generally settled in this country that a material alteration by a stranger will not render an instrument void, if it can be shown by evidence what the instrument was before it was altered (*Nichols v. Johnson*, 10 Conn. 192; *Rees v. Overbaugh*, 6 Cowen, 746; *Lewis v. Payn*, 8 Id. 71; *Medlin v. Platte County*, 8 Mo. 235; *Davis v. Carlisle*, 6 Ala. 707; *Waring v. Smith*, 2 Barb. Ch. 119; *Smith v. McGowan*, 3 Barb. 404; *Jackson v. Malin*, 15 Johns. 293; *City of Boston v. Benson*, 12 Cush. 61; *Worrall v. Gheen*, 59 Penn. St. 388). The question as to whether the alteration is material, is a question of law for the court (*Hill v. Calvin*, 4 How. (Miss.) 231; *Martendale v. Follett*, 1 N. H. 95; *Wheelock v. Freeman*, 13 Pick, 165; *Brackett v. Mountfort*, 2 Fairf. 115; *Southworth Bank v. Gross*, 35 Penn. St. 80). But the question as to whether it was made with fraudulent intent is one for the jury (*Bowers v. Jewell*, 2 N. H. 543). The burden of proving the alteration is on the party alleging it (*Davis v. Jenny*, 1 Metc. (Mass.) 221; and see generally, *Smith v. Crooker*, 5 Mass. 538; *Wiley v. Moor*, 17 S. & R. 438; *Duncan v. Hodges*, 4 McCord, 239; *Stone v. Wilson*, Id. 203; *Fulton's Case*, 7 Cowen, 484; *Bank v. Curry*, 2 Dana, 142; *Jordan v. Neilson*, 2 Wash. (Va.) 164; *Boardman v. Gore*, 1 Stew. 517; *Bank v. McChord*, 4 Dana, 191; *Getty v. Shearer*, 20 Penn. St. 12; *Chessman v. Whittemore*, 23 Pick. 231; *Ely v. Ely*, 6 Gray, 439; *Morris v. Vanderen*, 1 Dall. 67; *Prevost v. Gratz*, Pet. C. C. 369; *Gibbs v. Osborne*, 2 Wend. 555; *Acker v. Ledyard*, 8 Barb. 514; *Jackson v. Jacoby*, 9 Cowen, 125; *Withers v. Atkinson*, 1 Watts, 236; *Waring v. Smyth*, 2 Barb. Ch. 119). But alterations are immaterial after the estate has vested (*Chessman v. Whittemore*, 23 Pick. 231).

the face of it, or to give some reasonable evidence from which it may be inferred that the alteration was not made under such circumstances as would avoid the instrument.¹

391. Cancellation of contracts.—If a contract is canceled by mistake, the cancellation will be of no effect if the writing is legible and not obliterated. Where the seals of a deed were torn off by a little boy in sport, it was held that the operation of the deed was not affected thereby. (*x*) But it is otherwise, if the seals are torn off by the agreement of all the parties to a deed, with intent to cancel and annul the instrument. (*y*) If the drawer of a check or bill tears it up with the intention of destroying it, but does it so imperfectly that the pieces can be pasted together again so as to bear no marks of cancellation about them, the drawer will be responsible upon the instrument to a holder for value who has taken it in ignorance of its having been canceled. (*z*)²

392. Alteration of deeds.—If, after a deed is executed, material blanks purposely left in it are filled up with the assent of all the parties to the instrument or if a schedule is added to the deed describing certain property upon which the deed is to operate, and the deed is insensible and inoperative without the schedule, (*a*) or if a new covenantor is added, (*b*) the deed must be re-delivered, (*c*) and must have a fresh stamp; (*d*) but blanks left for filling in dates previ-

(*x*) *Argoll v. Cheney*, Palm. 403.

(*y*) 1 *Shep. Touch.* 70.

(*z*) *Ingham v. Primrose*, 28 L. J., C. P. 295; 7 C. B., N. S. 82.

(*a*) *Weekes v. Maillard*, 14 East, 572.

(*b*) *Gardner v. Walsh*, 5 El. & Bl. 83; 24 L. J., Q. B. 285.

(*c*) *Markham v. Gonaston*, 9 East, 354, n. *Hudson v. Revett*, 5 Bing. 368. *Hall v. Chandless*, 4 Bing. 123

Keele v. Wheeler, 13 L. J., C. P. 170; 8 Sc. N. R. 323. *Entnoven v*

Hoyle, 21 L. J., C. P. 100.

(*d*) *French v. Patton*, 9 East, 351.

¹ *Davis v. Jenny*, 1 Metc. (Mass.) 221.

² See cases cited in note 2, p. 287.

ously agreed upon, or the names of persons not being parties to the deed, may be filled up after the execution of the instrument. (e) And a bond remaining in the hands of the agent of the obligor as an escrow, is not avoided by the addition of another obligor, to the obligee. (f) Nor, when a deed inter partes is in progress of execution, and an alteration is made to meet the wishes of the parties who are about to execute it, does such alteration, if it does not alter the operation of the deed with respect to the parties who have previously executed it, avoid the deed. (g) An estate or interest once granted by deed will not be destroyed or affected by the subsequent alteration or destruction of the instrument under which it was created. (h)¹

393. Merger of a simple contract in a contract under seal.—If, after a simple contract or promise has been entered into or made, a contract under seal is executed for the performance of the same act or duty as that stipulated for by the simple contract, the simple contract becomes merged in the higher security, and can no longer be enforced, (i) provided the contracts are between the same parties and the remedies upon them are co-extensive; (k) but a contract under seal from some third party, given as a collateral security, will not merge a simple contract or promise; (l) nor will a bond or a deed for a debt different from

(e) *Adsetts v. Hives*, 33 Beav. 56.

(f) *Matson v. Booth*, 5 M. & S. 226. *Hudson v. Revett*, 2 M. & P. 621.

(g) *Doe v. Bingham*, 4 B. & Ald. 676. *Hall v. Chandiess*, 12 Moore, 316; 4 Bing. 123.

(h) *Bolton v. Bishop of Carlisle*, 2 H. Bl. 264; 4 B. & Ald. 677. *Davidson v. Cooper*, 11 M. & W. 800.

(i) *Schack v. Anthony*, 1 M. & S. 573. *Price v. Moulton*, 10 C. B. 561; 20 L. J., C. P. 102. *Saunders v. Milsome*, L. R. 2 Eq. 573.

(k) *Ansell v. Baker*, 15 Q. B. 20. *Sharpe v. Gibbs*, 16 C. B., N. S. 527. *Boaler v. Mayor*, 19 C. B., N. S. 76; 34 L. J., C. P. 230.

(l) *Twopenny v. Young*, 3 B. & C. 211; 5 D. & R. 261. *Holmes v. Bell*, 3 Sc. N. R. 479.

¹ See cases cited in note 1, p. 553.

the debt secured by the simple contract. (*m*) And a debt secured by a specialty may be further secured by a promissory note, provided such note be given after the execution of the deed.¹

394. Judgment recovered.—*County Court judgments.*—If there be a breach of contract by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, which is changed into matter of record, and the inferior remedy is merged in the superior, (*n*) provided the cause of action in the two suits is identical. (*o*) If judgment is given for the defendant, such judgment operates as an estoppel against the plaintiff, and precludes him from maintaining a second action for the same cause. (*p*) A judgment, therefore, in the county court is a bar to an action on the same subject-matter in any other court. (*q*)

A judgment recovered against one of two or more joint debtors or joint contractors might formerly be made the ground of a stay of proceedings against the others, (*r*) or might (though unsatisfied) be pleaded in bar to any action brought against the others upon the joint contract, or for the recovery of the joint debt. (*s*) But, where there are joint and several con-

(*m*) *Norf. Rail. Co. v. M'Namara*, 3 Exch. 630.

(*n*) *King v. Hoare*, 13 M. & W. 504, 506. *Buckland v. Johnson*, 15 C. B. 163; 23 L. R., 2 C. P. 264. *Kitchen v. Campbell*, 3 Wils. 308; 2 W. Bl. 827. *Stewart v. Todd*, 16 L. J., Q. B. 327.

(*o*) *Slade's case*, 4 Co. 94, b. *Phillips v. Berryman*, 3 Doug. 288. *Nelson v. Couch*, 33 L. J., C. P. 46; 15 C. B., N. S. 99.

(*p*) *Vooght v. Winch*, 2 B. & Ald. 662. *Overton v. Harvey*, 9 C. B. 324.

(*q*) *Austin v. Mills*, 9 Exch. 288; 23 L. J., Ex. 42.

(*r*) *Taunton J., v. Watters v. Smir's*, 2 B. & Ad. 895. *Newton v. Blunt*, 3 C. B. 681.

(*s*) *King v. Hoare*, 13 M. & W. 494. Since the passing of the Judicature Act, this, however, is probably no longer law.

¹ And see as to merger of mortgage in a deed, *Mulford v. Peterson*, 35 N. J. L. : 27; *Campbell v. Vedder*, 1 Abb. (N. Y.) App. Dec. 295.

tracts, or joint and several debts, or where the several parties are independently and collaterally bound by the same obligation, the recovery of judgment against one of such separate contractors or separate debtors is no bar to an action against the others, until the judgment has been satisfied. (*t*) And if one of such joint debtors was at the time the cause of action arose beyond seas, the recovery of judgment against those who were not beyond seas will not prevent an action being brought against the one who was absent beyond seas, on his return therefrom. (*u*) Judgment recovered in an action upon a bill of exchange given in payment and satisfaction of a sum of money due upon a covenant, is no bar to a subsequent action upon the covenant unless the judgment has been satisfied. (*x*) Where an action of assumpsit was by mistake brought against an administratrix who was not liable to an action at the suit of the plaintiff, and the defendant, instead of denying her liability, pleaded in abatement, and failed to prove her plea, and the plaintiff recovered *is.* damages, it was held that the verdict and judgment thereupon did not bar the plaintiff from maintaining a second action. (*y*)

Where the plaintiff had two demands against the defendant, one on a promissory note, and the other for the price of goods sold, and the defendant suffered judgment by default, and, on executing a writ of inquiry, evidence was only given on the first demand, and the plaintiff recovered damages adapted to that amount, the other demand for the goods remaining unsatisfied, it was held that as there were two distinct demands not in the least blended together, and the

(*t*) *King v. Hoare*, 13 M. & W. 504.
Vestry of Bermondsey v. Ramsey, 6 C.
 P. 246; 40 L. J., C P. 206.

(*u*) 19 & 20 Vict. c. 9, s. 11.
 (*x*) *Drake v. Mitchell*, 3 East, 251.
 (*y*) *Godson v. Smith*, 2 Moore, 161

plaintiff had failed through inadvertence in proving one of them, he might maintain a second action for it.

(z) If all matters in difference between a plaintiff and defendant are referred to an arbitrator, the award is no bar to any cause of action that was not inquired into before the arbitrator. (a) "If a plaintiff offers no evidence in the first action on a particular part of his claim, then a new action may be brought for such part; but if he does offer evidence and fails, he is prevented from bringing a fresh action." (b) Where a landlord sued his tenant for rent, and included, in his declaration, the ordinary money counts, and gave particulars on the count for money had and received of the value of a quantity of stone which had been quarried and carried away by the defendant, but at the trial took a verdict for the rent only, and then brought an action on the case against the defendant for quarrying and carrying away the stone, and delivered particulars—in the second action—for the same stone, exactly corresponding with the particulars delivered on the count for money had and received, it was held that the recovery in the first action was no bar to the second action, as the plaintiff could not, under the count for money had and received in that action, have recovered compensation for the damage done by the removal of the stone. (c) Whenever the same point was not in issue in the prior action, the judgment in such prior action can have no effect upon the second action. (d)

Where an action was brought upon a bill of exchange, and for the price of goods sold and work done and judgment was recovered for the whole, and after

(a) *Seddon v. Tutop*, 6 T. R. 609.

(c) *Hadley v. Green*, 2 Cr. & Jerv.

(a) *Ravee v. Farmer*, 4 T. R. 146.

376.

(b) *Stafford v. Clarke*, 9 Moore,

(d) *Carter v. James*, 13 M. & W

738.

137.

judgment the plaintiff entered a nolle prosequi as to part, it was held that this was equivalent to a retraxit and a bar to any future action for the same cause. (e). In every plea of judgment recovered, the defendant is now required to state, in the margin of the plea, the date of the judgment, and, if the judgment is in a court of record, the number of the roll (if any) on which it is entered. (f)¹

395. Foreign and colonial judgments.—"Judgments in foreign courts are not upon the same footing as judgments in our own courts of record. They do not bar or stay an action ex contractu. (g) But judgment recovered in a foreign court, and payment of the sum recovered, is a good bar to the same cause of action. (h) A judgment of a foreign or colonial court is conclusive inter partes, (i) unless it can be shown that the court had no jurisdiction, or that it was obtained by fraud, or perhaps that it was given against good faith and natural justice. (k)

396. Discharge by death.—In contracts for personal services, it is an implied condition that the death of either party shall dissolve the contract. Thus, where A was hired by B to serve as farm-bailiff, at

(e) *Bowden v. Horne*, 7 Bing. 716.

(f) Reg. Gen. 1 El. & Bl., App. iii.

(g) *Hall v. Odber*, 11 East, 124.

Smith v. Nicolls, 5 Bing. N. C. 208.

2 *Smith's L. C.* 683-705, 5th ed.

Plummer v. Woodburne, 4 B. & C.

625. *Vanquelin v. Bouard*, 33 L. J.,

C. P. 78; 15 C. B., N. S. 341. *Scott*

v. Pilkington, 2 B. & S. 11, 41; 31 L. J., Q. B. 81, 89.

(h) *Barber v. Lamb*, 8 C. B., N. S. 95; 29 L. J., C. P. 234.

(i) *Bank of Australasia v. Nias*, 20

L. J., Q. B. 284. *De Cosse Brissac v.*

Rathbone 6 H. & N. 301; 30 L. J.,

Ex. 238.

(k) *Post*, bk. 2, ch. 8, s. 1.

¹ And so a judgment does not extinguish the original debt on which it was recovered, if it was recovered not against the original debtor, but against one standing in the position of a surety (*Clapp v. Meserole*, 1 Abb. (N. Y.) App. Dec. 382). And see also as to estoppel by judgment *Malloney v. Horan*, 49 N. Y. 111.

weekly wages, the service to be determinable by six months' notice, or payment of six months' wages, and B died, it was held that B's representative was not bound to continue A in her service, or pay him six months' wages. (1)¹

397. Discharge by bankruptcy.—An order of discharge in bankruptcy discharges the bankrupt from all debts and liabilities, present or future, certain or contingent (except demands in the nature of unliquidated damages, arising otherwise than by reason of a contract or promise), to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy by reason of any obligation incurred previously to the date of the order of adjudication. (m) The word "liability" is for the purposes of the act to include any compensation for work or labor done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur or capable of occurring before the close of the bankruptcy, and generally any express or implied engagement, agreement, or undertaking to

(1) *Farrow v. Wilson*, L. R., 4 Robinson *v. Davidson*, L. R., 6 Ex. C. P. 744. And see *Whincup v.* 269.

Hughes, L. R., 6 C. P. 78, and (m) Bankruptcy Act of 1869, sects. 31, 49.

¹ And so the right to recover for the breach of a promise to marry does not pass to the executor (*Stebbins v. Palmer*, 1 Pick. 71). And in other cases where the injury is personal, though accompanying a breach of contract. *Cook v. Newman*, 8 How. Pr. 523; and see *White's Ex'rs v. Commonwealth*, 39 Penn. St. 167; *Merritt v. Seaman*, 2 Seld. 168; *Lawrence v. Wright*, 23 Pick. 128; *Rat'oon v. Overacker*, 8 Johns. 126; *Winchester v. Union Bank*, 2 G. & J. 79, 80; *Bell v. Speight*, 11 Humph. 451.

pay, or capable of resulting in the payment of money or money's worth, whether such payment be, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation, capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion. But the court may, if it think the value of the debt or liability incapable of being fairly estimated, make an order to that effect, and such debt or liability will not then be provable, and will not be barred by the order of discharge. (n) It is the duty of the court to bring within the act all possible contracts that have been broken, so as to discharge the bankrupt, (o) but the order of discharge will not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, nor from any debt or liability whereof he has before the commencement of the bankruptcy obtained forbearance by any fraud; (p) nor does it release any one who, at the date of the order of adjudication, was a partner with the bankrupt, or was jointly bound or had made any joint contract with him. (q) But an order of discharge granted to a debtor, who is one of a partnership firm, in his separate bankruptcy or liquidation, releases him from his joint as well as from his separate debts. (r) Sureties also remain liable notwithstanding the bankruptcy of their principal; (s) and the landlord's remedy, by way of distress, for the recovery of rent due to him at the time of the bankruptcy, remains unaffected by the certificate, although

(n) Sect. 31.

(q) Sect. 50.

(o) Ex parte Waters. L. R. 8 Ch. 852. See, also, Ex parte Peacock, L. R. 8 Ch. 682.

(r) Ex parte Hammond, L. R., 16 Eq. 614.

(p) Sect. 49.

(s) Tuck v. Fyson, 3 M. & P 715.

he has proved for the rent. (*t*) But no distress is to be available for more than a year's rent accrued, due prior to the order of adjudication. (*u*) The landlord cannot, of course, prove and distrain for the same rent; but he may distrain for the year's rent, and prove for the balance. (*x*) A covenant that a creditor shall be at liberty to seize after-acquired property of the debtor if he fails to pay the debt, is at an end if the debtor afterwards becomes bankrupt and is discharged from the debt. (*y*) Proof of a debt under an adjudication in bankruptcy is no answer to an action for the debt. (*z*)

398. Operation of payment of the dividend.—Payment of a dividend in bankruptcy is not payment of the debt, except as against the debtor himself, and confers no right on the bankrupt or his trustee to call upon the creditor to surrender any collateral security. (*a*)

399. Liquidation by arrangement.—A certificate of discharge under a liquidation by arrangement has the same effect as an order of discharge in bankruptcy. (*b*) The debtor will remain liable for the unpaid balance of any debt which he incurred or increased, or whereof before the date of the arrangement he obtained forbearance, by any fraud, provided the defrauded creditor has not assented to the arrangement otherwise than by proving his debt and accepting dividends. (*c*)¹

(*t*) *Newton v. Scott*, 9 M. & W. 434; 10 Id. 471. *Phillips v. Shervill*, 6 Q. B. 952.

(*u*) Bankruptcy Act of 1869, s. 34.

(*x*) *Ex parte Grove*, 1 Atk. 105.

(*y*) *Thompson v. Cohen*, L. R., 7 Q. B. 527; 41 L. J., Q. B. 221.

(*z*) *Spencer v. Demett*, 4 H. & C. 127; L. R., 1 Ex. 123; 35 L. J., Ex. 73.

(*a*) *Ewart v. Latta*, 4 Marcq. H. L. Cas. 983.

(*b*) Sect. 125, par. 10.

(*c*) Debtors' Act, 1869, sect. 15.

¹ See the United States Bankrupt Law, § 6, *post*, this chapter.

400. Composition with creditors.—The provisions of a composition under the bankruptcy act, accepted by an extraordinary resolution, will be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shown in the statement of the debtor produced to the meeting at which the resolution is passed, but will not affect or prejudice the rights of any other creditor. (*d*) And the same provision exists as to fraudulent debtors as in the case of liquidation by arrangement. (*e*) If the composition is not paid, the creditors may bring action for their original debts; (*f*) and, if the composition is payable by instalments, and any instalment is unpaid, they may sue for the balance of the original debt remaining unpaid. (*g*) But a resolution by the majority of creditors to accept a composition payable by instalments is a bar to an action for the original debt, brought, before default in payment of the instalments, by a creditor who is bound by the resolution. (*h*) No formal tender of the composition is necessary; it is enough if the debtor is ready to pay, and expresses his willingness to do so. (*i*)¹

401. Effect of a discharge in bankruptcy on debts contracted abroad.—The English bankruptcy law is binding upon the colonies, and the English courts are bound by its provisions in actions on foreign and colonial as well as on English debts. (*k*) Thus, an English certificate in bankruptcy has been held to be

(*d*) Bankruptcy Act, 1869, sec. 126, 723. *Goldney v. Lording*, L. R., 8 Q. B. 182.

(*e*) Debtors' Act, 1869, sect. 15, (*k*) *Slater v. Jones*, L. R., 8 Ex. 186. *supra*. (*i*) *Hemminway, ex parte*, 26 I. T.,

(*f*) *Edwards v. Coombe*, L. R., 7 N. S. 298.

C. P. 519; 41 L. J., C. P. 202.

(*h*) *Ellis v. McHenry*, L. R., 6 C.

(*g*) *Halton, in re*, L. R., 7 Ch. P. 228; 40 L. J., C. P. 105.

¹ Id

a good answer to a debt arising in Calcutta, and sued for in the supreme court there; (*l*) and the same has been held in Scotland with reference to a debt contracted. (*m*) So also an English certificate has been held in the English courts to discharge a debt contracted in Ireland; (*n*) and a debt contracted in England, and sued for there, has been held to be discharged by a discharge under a Scotch sequestration, (*o*) or by an Irish certificate, (*p*), or a discharge in Newfoundland. (*q*)¹

402. *The statutes of limitation.—Limitation of actions for the recovery of fee farm rents and money charged on land.*—"By the real property limitation act, 1874 (37 & 38 Vict., c. 57), which, however, is not to come into operation until the 1st January, 1879, the time for the recovery of rent or money secured by mortgage, judgment, or lien, or otherwise charged on land is limited to twelve and six years respectively, in place of the periods of twenty and ten years limited by the 3 & 4 W. 4, c. 27." By the 3 & 4 Wm. 4, c. 27, it is enacted (ss. 2, 3), that all actions and suits brought for the recovery of rent by persons not being ecclesiastical or eleemosynary corporations (s. 29) shall be brought within twenty years after the right thereto has accrued to the plaintiff or to the person through whom he claims. (*r*) And, as regards money

(*l*) *Edwards v. Ronald*, 1 Knapp, P. C. 259.

(*m*) *Royal Bank of Scotland v. Cuthbert*, 1 Rose, 462, 486.

(*n*) *Lynch v. McKenny*, cited 2 H. Bl. 554.

(*o*) *Sidaway v. Hay*, 8 B. & C. 477, 181.

(*p*) *Ferguson v. Spencer*, 1 M. & G. 387.

(*q*) *Philpotts v. Reed*, 1 B. & B. 294.

(*r*) This does not apply to an action on a covenant to pay a rent charged on land (*Manning v. Phelps*, 10 Exch. 59; 24 L. J., Ex. 62); nor to rents reserved on leases for years, but to ancient rent service, fee farm rent, and the like (*Grant v. Ellis*, 9 M. & W. 113. *Archbold v. Scully*, 9 H. L.

¹ See the United States Bankrupt Law, § 6, *post*, this chapter

secured by mortgage, judgment, or lien, or otherwise charged upon or payable out of land, it is enacted (s. 40), that no action or suit shall be brought for the recovery thereof but within twenty years next after a present right to receive such money (*s*) shall have accrued to some person capable of giving a discharge for, or a release of, the same; unless, in the meantime, some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, (*t*) to the person entitled thereto, or his agent, in which case the action or suit is to be brought within twenty years after the payment or acknowledgment; and no arrears of rent, or of interest in respect of money charged on land, and no damages in respect of such arrears of rent or interest, are (s. 42) to be recovered by any private person by distress, action, or suit, but within six years next after the same shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent. (*u*) So long as the relation of landlord and tenant subsists, the right of the landlord to rent is not barred by non-payment, except that under sect. 42 of the 3 & 4 Will. 4, c. 27, the amount to be recovered is limited to six years. (*x*) Where, under a power of sale in a mortgage deed the property

Cas. 360). As to tithes, see Dean, &c. of *Ely v. Cash*, 15 M. & W. 617.

(*s*) *Sheppard v. Duke*, 9 Sim. 567.

(*t*) *Forsyth v. Bristowe*, 8 Exch. 720. *Staley v. Barrett*, 26 L. J., Ch. 321.

(*u*) An acknowledgment contained

in a deed speaks from the time of the execution of the deed. *Jaynes v. Hughes*, 24 L. J., Ex. 116. An answer to a bill in equity may be an acknowledgment. *Goode v. Job*, 28 L. J., Q. B. 1; 1 Ell. & Ell. 6.

(*x*) *Archbold v. Scully*, 9 H. L. Cas. 360.

mortgaged was sold, and the proceeds paid into court to the general credit of an account in an administration suit of the estate of the mortgagee, upon a petition by trustees of the parties beneficially entitled to the fund in court, it was held that they were entitled to the full arrears of interest on the mortgage, the fund after sale having been in their possession, and no recovery by distress, suit, or action being requisite.

(y) In a suit to foreclose, a mortgagee can only recover arrears of interest for six years next preceding the suit, though the principal and interest are secured by the covenant and bond of the mortgagor. (z) The words in sect. 40, "by the person by whom the same shall be payable, or his agent," apply equally to the making of a payment and the signing an acknowledgment. (a)

But where any prior mortgagee or incumbrancer shall have been in possession of land, or the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt, although such time may have exceeded the said term of six years. And the effect of the 3 & 4 Wm. 4, c. 27, s. 42, is qualified by the 3 & 4, Wm. 4, c. 42, s. 3, which enacts that actions for rent on an indenture of demise and actions of covenant or debt on any bond or specialty, must be brought within twenty years after

(y) *Edmunds v. Waugh*, L. R., 1 Eq. 418; 35 L. J., Ch. 234. But see *Mason v. Broadbent*, 33 Beav. 296.

(s) *Round v. Bell*, 31 L. J., Ch. 127; 30 Beav. 221.

(a) *Chinnery v. Evans*, 11 H. L. C. 115.

the accrual of the cause of action; so that, although the land cannot be charged with more than six years arrears of rent or interest, (*b*) yet, if there be a covenant for the payment thereof, twenty years' arrears may be recovered by action on the covenant. (*c*)

Where a mortgage deed had been executed in 1830 to secure a principal sum and interest, with a covenant therein for the payment of the interest, and the mortgagor died, and his co-heirs sought to redeem, and there was a long arrear of interest unpaid, it was held that six years' arrears only were a charge upon the land under the 3 & 4 Wm. 4, c. 27, s. 42, but that twenty years' arrears might be recovered by action on the covenant under the 3 & 4 Wm. 4, c. 42, s. 3, and that, if the heir of the mortgagor comes to redeem, the personal liability upon the covenant may be tacked on to the mortgage, and payment of all the arrears for twenty years be exacted as the price of the redemption. (*d*)

403. *Limitation of actions for the recovery of rent, and specialty and simple contract debts.*—By the 3 & 4 Wm. 4, c. 42, s. 3, it is enacted that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or scire facias upon any recognizance, shall be commenced and sued within twenty years after the cause of such actions or suits, but not after, except where the time for bringing the action is specially limited by statute; and by the 21 Jac. 1, c. 16, s. 3, and the 19 & 20 Vict. c. 97, s. 9, all actions of detinue, trover, and replevin, for taking

(*b*) As to arrears of fee farm rent or of rent-charge being recoverable only for six years, see *Humphrey v. Gery*, 7 C. B. 567. *Francis v. Grover*, 5 Hare, 39.

(*c*) *Paget v. Foley*, 3 Sc. 120. *Strachan v. Thomas*, 12 Ad. & E. 556. *Hunter v. Nuckolds*, 18 L. J., Ch. 407.

(*d*) *Elvy v. Norwood*, 21 L. J., Ch. 716.

away of goods or cattle; all actions of account and for not accounting, and suits for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants; all actions upon the case; all actions of debt grounded upon any lending or contract without specialty; and all actions of debt for arrearages of rent, (e) and upon an award where the submission is not by deed, (f) must be commenced and sued within six years next after the cause of such action or suit, and not afterwards; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit is enforceable by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit.

404. *What are specialty debts.*—An action founded on the provisions of an act of parliament, such as an action for calls, is an action on a specialty. (g) But an action of debt for a penalty due under a by-law founded on the charter of a chartered company is an action of debt grounded upon a contract without specialty, and is barred by the statute if not commenced within six years after the penalty becomes due, although the charter is under the great seal and is matter of record; for the liability springs out of the consent of the party to become a member of the company and obey the by-laws, which is in effect a contract without specialty. (h) If one party is in-

(e) *Leigh v. Thornton*, 1 B. & Ald. 627. This applies only to rent reserved on a demise without deed (*Freeman v. Stacey*, Hutt, 109). Rents reserved upon a lease under seal, rent-charges founded upon a deed, or a reservation of rent upon a fee

simple by deed, are not touched by this statute.

(f) 3 & 4 Wm. 4, c. 42, s. 3.

(g) *Cork & Bandon Rail. Co. v. Goode*, 13 C. B. 826; 22 L. J., C. P. 198. *Shepherd v. Hills*, 11 Exch. 67.

(h) *The Master-Warden of the To-*

debted to another by simple contract, and the simple contract debt is recited or acknowledged in a deed, the debt does not become a specialty debt, unless the terms of the deed are such as to raise between the parties an implied covenant for the payment of the money. (*i*)

405. *Of the exception in favor of persons laboring under temporary disabilities.*—If the person entitled to any such action is, at the time the action accrues, within the age of twenty-one years, or feme covert, or non compos mentis, such person is at liberty to bring the same actions so as they are commenced within the time of limitation after the coming to, or being of, full age, discover, or of sound mind. (*k*) Formerly, imprisonment or absence beyond sea had the effect of extending the period of limitation; but it has recently been enacted (19 & 20 Vict., c. 97, s. 10), that no person shall be entitled to any time within which to commence an action or suit beyond the period fixed by these statutes, by reason only of his being absent beyond sea or in imprisonment at the time the cause of action or suit accrued. (*l*) Formerly, the absence beyond sea of any of several joint defendants prevented the statute from running as against those who were resident in England. (*m*) But this has been altered by the 19 & 20 Vict., c. 97, s. 11. Where a cause of action has once accrued, and the statute has begun to run, there being then a capacity of suing and of being sued, the time of limitation continues to run,

bacco-Pipe Makers v. Loder, 20 L. J., Q. B. 414.

(*i*) *Ivens v. Elwes*, 3 Drew. 25; 24 L. J., Ch. 249.

(*k*) 3 & 4 Wm. 4, c. 42, s. 4.

(*l*) This section is retrospective. *Pardo v. Bingham*, L. R., 4 Ch. 735;

39 L. J., Ch. 170, following *Cornill v. Hudson*, 8 El. & Bl. 429.

(*m*) *Fannin v. Anderson*, 7 Q. B. 811. *Towns v. Mead*, 16 C. B. 134. But see the 15 & 16 Vict. c. 76, s. 18.

and is not stopped by the circumstance of the death of one of the parties, and delay in taking out administration. (n) Any portion of time in which the parties are under disabilities occurring after the time has begun to run must nevertheless form part of the period of limitation. (o)

406. *Of the commencement of the time of limitation.*—The time of limitation begins to run from the period of the breach of contract and the accrual of the cause of action, and not from the time of the making of the contract. If, therefore, a thing is to be done on the happening of a contingent or uncertain event, there can be no cause of action and no limitation of time until the event has happened. (p) Where a bond is conditioned for the performance of acts to be done successively in a series of years, a new cause of action arises with each omission to do the act at the proper time; and, if the plaintiff can show any breach within twenty years, he is entitled to recover. (q) In the case of a solicitor's bill for an action, the statute does not begin to run so long as the action is pending, although it has been allowed to sleep for a vast number of years. (r) If a contract has been broken, and has given rise to a cause of action, and this cause of action is suspended by a subsequent agreement between the parties which is also broken, and the creditor is remitted to his original right of action, the time of limitation will run from the period of the

(n) Penny v. Brice, 18 C. B., N. S. 393. kins, 4 C. B. 664; 16 L. J., C. P. 201.

(o) Rhodes v. Smethurst, 4 M. & W. 61. Freake v. Cranefeldt, 3 Myl. & Cr. 499. (q) Amott v. Holden, 22 L. 1., Q. B. 19. Blair v. Ormond, 20 Id. 452. White v. Corbett, 1 El. & El. 692; 28

(p) Savage v. Aldren, 2 Stark. 232. L. J., Q. B. 228.

Fenton v. Emblers, 1 W. Bl. 353. (r) Whitehead v. Lord, 21 L. J., Bill v. Lake, Hetl. 138. Shutford v. Ex. 239.

Borough, Godb. 437. Tuckey v. Haw-

breach of the second agreement, and not from the time of the breach of the original contract. (s) When a debt has been contracted on credit, no cause of action arises until the period of credit has expired. (t) If a debt is to be paid by instalments, and it is provided that, in case default is made in payment of any one instalment when due, the whole debt shall be immediately recoverable, the entire cause of action accrues upon the first default, and the period of limitation begins to run therefrom. (u) If an action is brought for the recovery of the consideration paid for a void annuity, the time of limitation runs from the period when the grantee elected to treat the annuity as void, and not from the time of the payment of the consideration and the making of the grant. (x)

It is a general rule that, were there has once been a complete cause of action, the statute begins to run, and that subsequent circumstances which would but for the prior wrongful act or default have constituted a cause of action are disregarded. As, for instance, in the case of a bill of exchange drawn at so many months after sight and refused acceptance, the cause of action is complete, and the statute begins to run, upon the refusal of the acceptance, and no new cause of action arises upon refusal of payment. This rule, however, is not universal; for, in cases where a man undertakes to do an act upon a future day, and, before the day arrives, disables himself from performing the act, or positively and absolutely refuses to be bound by or perform his contract, and, so to speak, declares off the bargain himself and absolves the opposite party, it is in the option of such party at his election

(s) *Irving v. Veitch*, 3 M. & W. 110.

(t) *Helps v. Winterbottom*, 2 B. & Ad. 431.

(u) *Hemp v. Garland*, 4 Q. B. 524.

(x) *Cowper v. Godmond*, 3 M. & Sc. 219; 9 Bing. 753.

to treat that conduct as of itself a violation and breach of the contract, or to insist upon holding the repudiating party liable, and to sue him for non-performance when the day arrives. The misconduct of the party who acts in fraud of the bargain in such cases gives the other party thereto the election of suing either for the first violation or for non-performance at the day; and it does not furnish the wrong-doer with any answer to the latter action. (*γ*) So, if a person intrusted with a thing for safe custody, wrongfully parts with it, the owner may, at his election, either sue for the wrongful parting with the property, or he may wait until there is a breach of the bailee's duty, in the ordinary course, by refusal to deliver up on request; and in the latter case, it is no answer for the bailee to say that he has, by his own misconduct, incapacitated himself from complying with the lawful demand of the bailor, agreeably to the maxim, 'Qui dolo desiit possidere pro possidente damnatur.' (*z*)

407. *Contingent and conditional liabilities.*—Whenever the liability of the defendant is dependent upon some contingency, or the happening of some uncertain event, the cause of action does not arise until the contingency has happened. If a man has promised to pay a sum of money as soon as his circumstances enable him to do so, the time of limitation runs from the period of his being able to pay. (*a*) If a surety guarantees the payment of a debt by his principal, the time of limitation runs from the period of the principal's making default in payment. (*b*) If

(*γ*) *Hockster v. De la Tour*, 2 E. & B. 678; 22 L. J., Q. B. 455. *Frost v. Knight*, L. R., 7 Ex. 111; 41 L. J., Ex. 78.
 (*a*) *Reeve v. Palmer*, 5 C. B., N. S. 84, 91; 27 L. J., C. P. 327; 28 Id.
 168. *Wilkinson v. Verity*, L. R., 6 C. P. 206; 40 L. J., C. P. 141.
 (*a*) *Waters v. Earl Thanet*, 2 Q. B. 757. *Hammond v. Smith*, 33 Beav. 452.
 (*b*) *Humphreys v. Jones*, 14 M. & W. 1.

a surety sues his principal upon the implied contract of the principal to indemnify the surety, the time allowed for bringing the action runs from the time that the surety actually paid what the principal was bound to pay, and not from the time that he became liable to pay. (c) If one man agrees to indemnify another against costs, the cause of action accrues at the time the costs are actually paid by the party who is to be indemnified, and not at the time that the costs are incurred. (d') In the case of co-sureties suing each other for contribution, the time of limitation runs from the period when the co-surety was called upon to pay more than his own share of the common liability, and not from the time that the principal, for whom they became responsible, made default. "If, therefore, the co-surety, more than six years before the action, has paid a portion of the debt, and the principal has paid the residue within six years, the time of limitation will not run from the original payment by the co-surety, but from the payment of the residue by the principal; for until the latter date it does not appear that the co-surety has paid more than his share, and has in consequence thereof a right of action for contribution." (e)

When a demand or request of performance of a contract is a condition precedent to a right of action for non-performance, the time of limitation runs from the period of the making of the request or demand. (f) But it is otherwise, if no demand or request is necessary to give rise to a right of

(c) *Reynolds v. Doyle*, 2 Sc. N. R. 46.

(d') *Collinge v. Heywood*, 9 Ad. & E. 633.

(e) *Davies v. Humphreys*, 6 M. &

W. 169. *Huntley v. Sanderson*, 1 Cr. & M. 480.

(f) *Buckler v. Moor*, 1 Mod. 83. *Topham v. Braddick*, 1 Taunt. 572.

Webb v. Martin, 1 Lev. 48. *Mills v. Borthwick*, 35 L. J., Ch. 31.

action. (*g*) When a bill of exchange or a promissory note has been made payable at sight, the time of limitation runs from the time when the bill or note is presented for payment. (*h*) If a promissory note is made payable two years after demand of payment, the time of limitation begins to run two years after a demand has been proved to have been made. (*i*) But if the note is payable on demand simply, then, as no demand is necessary before bringing an action (the service of a writ upon the maker of the note being considered a sufficient demand), the time of limitation runs from the period of the making of the note. (*k*) The same rule prevails with regard to a loan of money payable on demand. (*l*) . But where the plaintiff, having agreed to lend the defendant a sum of money, gave him a check for the amount, which the defendant paid in to his bankers, receiving credit for it, and the check was not paid by the plaintiff's bankers till some days later, it was held that, in an action for the money so lent, the statute only ran from the time of the payment of the check by the plaintiff's bankers. (*m*) . And where a promissory note, payable on demand, was given to a banker to secure future advances, it was held that the statute did not begin to run until the account was closed and the credit determined. (*n*)

408. *Unknown and undiscovered breaches of contract.*—It is said to be a general rule of law, that the time of limitation runs from the period when the contract was broken, and not from the time that knowl-

(*g*) *Collins v. Benning*, 12 Mod. 444. *Emery v. Day*, 1 C. M. & R. 248.

(*h*) *Holmes v. Kerrison*, 2 Taunt. 323.

(*i*) *Thorpe v. Booth*, R. & M. 388.

(*k*) *Norton v. Ellam*, 2 M. & W. 461. *Waters v. Earl Thanet*, 2 Q. B. 769.

(*l*) *Jackson v. Ogg*, 1 Johns. 397; 5 Jur. N. S. 976.

(*m*) *Garden v. Bruce*, L. R., 3 C. P. 300; 37 L. J., C. P. 112.

(*n*) *Hartland v. Jukes*, 1 H. & C. 673; 32 L. J., Ex. 162.

edge of the breach of contract first came to the plaintiff, nor from the time that any particular or special damage may have accrued or been discovered, (o) whether the breach of contract was patent and discoverable, or whether it was concealed and undiscoverable, and whether there has been laches or neglect on the part of the plaintiff in not finding out that the contract had been broken and that the cause of action had accrued, (p) or whether it was physically impossible for the plaintiff to know of the breach until he had sustained the resulting damage. And it has been held that, even if the defendant has resorted to fraudulent shifts and contrivances to prevent the plaintiff from knowing of the defendant's breach of contract, and of the accrual of the cause of action until after the time of limitation has expired, the perpetration of the fraud does not prevent the defendant from availing himself of the benefit of the statute. (q)

It has been held that, if a person professing to be skilled in the investment of money undertakes for hire to invest a sum of money on good security, and receives the money, and, acting with gross carelessness, invests it in bad security, but the worthlessness of the security is not known to the promisee for more than six years after the making of the promise, when the interest of the money ceases to be paid by some third party for the first time, the promisee is barred of all remedy by the statute. (r) This construction of

(o) *Battley v. Faulkner*, 3 B. & Ald. 288.

(p) *Granger v. George*, 5 B. & C. 152; 7 D. & R. 732. *Denys v. Shuckburgh*, 4 Y. & C. 42.

(q) *Imp. Gas Co. v. Lond. Gas Co.*, 10 Exch. 39; 23 L. J., Ex. 303. Lord Mansfield, however, appears to have thought that there might be cases of

fraud which would preclude a defendant from relying on the statute. *Bree v. Holbeck*, 2 Doug. 655. *South Sea Co. v. Wymondsell*, 5 P. Wms. 143 and see *Story's Eq. Jur.*, § 1521, and *Spence's Eq. Jur.*, vol. ii. p. 62.

(r) *Howell v. Young*, 5 B. & C. 259; 8 D. & R. 21. *Whitehead v. Howard*, 2 B. & B. 375. *Short v. McCarthy*, 3

the statute of limitations, which deprives a man of redress after the expiration of six years, when the act causing the damage was unknown to him, may seem to be harsh and contrary to the ordinary principles of law. (s) Formerly, the acceptance and receipt of money under the circumstances above mentioned, and its fraudulent misapplication, or its investment on bad security, through the gross carelessness of the receiver and undertaker of the duty, was, in most cases, held in equity to amount to a breach of trust. (t) But it seems open to doubt whether this construction will any longer prevail. (u)

409. Acknowledgments of deeds and specialties extending the period of limitation.—By the 3 & 4 Wm. 4, c. 42 (s. 5), it is enacted that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of an indenture, specialty, or recognizance, or his agent, or by part payment, or part satisfaction, on account of any principal sum or interest due thereon, it shall be lawful for the person entitled to such action to bring his action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing, or part payment, or part satisfaction, or in case the person entitled to such action shall at the time of such acknowledgment be under disability, or the party making such acknowledgment be at the time of making the same beyond the seas, then within twenty years after such disability shall have ceased, or the party shall have returned from beyond seas; and

B. & Ald. 626. *Sims v. Brutton*, 20 L. J., Ex. 41; 5 Exch. 802.

(s) *Bonomi v. Backhouse*, Ell. Bl. & Ell. 659; 28 L. J., Q. B. 378.

(t) *Smith v. Pococke*, 2 Drew. 197. *Blair v. Bromley*, 5 Hare, 542.

(u) See the Supreme Court of Judicature Act, s. 25 (2), by which the Statute of Limitations is made inapplicable to an express trust.

the plaintiff in any such action on any indenture, specialty, or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of the statute. Any acknowledgment amounting to a clear admission of the specialty debt will be a bar to the setting up the statute. (x) A recital in a deed of a prior mortgage deed assigning certain property as the security for the payment of a mortgage debt is not necessarily an acknowledgment of the mortgage debt, within the meaning of the statute. (y) But a recital in a mortgage deed of the payment of interest up to the date thereof, made within twenty years of action brought, takes the case out of the statute. (z)

410. Acknowledgments of, and promises to pay, simple contract debts.—By the 9 Geo. 4, c. 14, s. 1, it is enacted that in actions of debt, or upon the case grounded upon simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new and continuing contract, whereby to take any case out of the operation of the statute of limitations; and that no person shall be deprived of the benefit of the act, unless the acknowledgment or promise shall be made by writing signed by the party chargeable thereby, or by his duly authorized agent; (a) but nothing contained in the act is to alter, take away, or lessen the effect of any payment of any principal or interest by any person whatever. Since this statute, therefore, there must be either a written acknowledgment, signed as therein mentioned, or an act done which is equivalent, in contemplation of law, to part payment of principal, or payment of interest. (b)

(x) *Moodie v. Bannister*, 28 L. J., Ch. 861; 4 Drew. 432.

(y) *Hewgitt v. Bonser*, 3 Exch. 499; 18 L. J., Ex. 262.

(z) *Forsyth v. Bristowe*, 8 Exch. 721.

(a) 19 & 20 Vict. c. 97. s. 13.

(b) *Williams v. Griffiths*, 2 C. M. & R. 48.

An infant is of sufficient capacity to make an acknowledgment in writing, under this statute, of a debt due for necessities; and the acknowledgment will be evidence against him for six years after it has been made. (c)

411. *Of the form and requisites of the acknowledgment.*—Any writing signed by a defendant or his authorized agent, admitting that a sum of money is due upon a bond, or deed or simple contract, at the time of the making of the admission, will revive the remedy upon the contract, although it contains, upon the face of it, no express promise to pay or to make satisfaction. But, if there is no express promise to pay, the acknowledgement must be such that a promise to pay may be inferred in fact. (d) In the case of simple contract debts, it was at one time held that a “positive refusal to pay was an acknowledgment. The tide of authorities, however, changed; and the courts began to require the acknowledgment to be such as to justify them in inferring therefrom a promise to pay.” (e) The insertion of a debt, therefore, in a petition to the court of bankruptcy is no acknowledgment of the debt within the statute, as it rebuts the presumption of a promise to pay it. (f) So the insertion of a debt in the schedule to a deed of inspektorship, executed for the purpose of administering the estate of a debtor, is not, although the schedule is verified by the affidavit of the debtor, a sufficient acknowledgment to take the debt out of the operation of the statute of limitations, so as to

(c) *Willins v. Smith*, 4 Ell. & Bl. 185; 24 L. J., Q. B. 62. Bing. N. C. 241. *Cornforth v. Smith*, 5 H. & N. 13; 29 L. J., Ex.

(d) *Mitchell's Case*, L. R., 6 Ch. 228.

822, 828

(f) *Everett v. Robertson*, 1 Ell. &

(e) *Linley v. Bonsor*, 2 Sc. 404; 2 Ell. 19; 28 L. J., Q. B. 24.

entitle the creditor to prove for the debt under a subsequent administration of the debtor's estate in bankruptcy. (*g*) If there is an acknowledgment of the debt, with a suggestion as to the most convenient mode of payment, (*h*) or a mere acknowledgment without any accompanying observations, that will be sufficient; "because," observes Parke, B., "from the absolute acknowledgment of a debt, unaccompanied by any qualifying observations, you may infer a promise to pay on request." (*i*) An admission which stops short of being an admission of a debt being due will not suffice for the maintenance of an action; (*k*) such as a letter saying, "Doubtless I did owe the money; but I have already paid it;" (*l*) or, "I admit the debt; but I have got a set-off;" or, "the debt is barred by the statute of limitations." (*m*) If a man admits that a signature to an accountable receipt is his signature, but at the same time says it was never worth anything, this is no admission or acknowledgment. (*n*) Wherever the acknowledgment is accompanied by a repudiation of liability, though it may show clearly that the debt never has been paid, but is still a subsisting debt, the plaintiff fails. (*o*)

Where the defendant's promise to pay is qualified and conditional, the condition must be shown to be accomplished, and the promise to have become abso-

(*g*) *Topping, ex parte, in re Levey*, 34 L. J., Bk. 44.

(*h*) *Evans v. Simon*, 9 Exch. 285; 23 L. J., Ex. 16.

(*i*) *Smith v. Thorne*, 21 L. J., Q. B. 201. *Dabbs v. Humphries*, 10 Bing. 449. *Holmes v. Mackrell*, 3 C. B., N. S. 794.

(*k*) *Collinson v. Margesson*, 27 L. J., Ex. 305.

(*l*) *Bryan v. Horseman*, 5 Esp. 81. *Birk v. Guy*, 4 Id. 184.

(*m*) *Swan v. Sowell*, 2 B. & Ald. 761. *Boydell v. Drummond*, 2 Campb. 161. *Francis v. Hawkesley*, 28 L. J., Q. B. 370; 1 El. & El. 1052.

(*n*) *Bowcroft v. Lomas*, 4 M. & S. 459.

(*o*) *Tanner v. Smart*, 6 B. & C. 606. *Brigstocke v. Smith*, 1 Cr. & M. 485. *A'Court v. Cross*, 3 Bing. 329. *Rackham v. Marriott*, 2 H. & N. 196; 26 L. J., Ex. 315.

lute. (*p*) If the defendant has promised to pay as soon as he is able, or as soon as his circumstances will permit, his ability to pay must be shown before he can be made liable upon this promise. (*q*) The amount of the debt may be shown by parol testimony, and need not appear upon the face of the writing; (*r*) and, if the defendant admits the debt, but objects to the amount claimed, the law will infer from the admission a promise to pay what, upon investigation, shall appear to be due; and the admission, consequently, will give rise to a cause of action, and be a bar to the statute. (*s*) If, in an account rendered, there are two perfectly distinct items, not in any way connected together and forming no part of one continuous transaction, a signed acknowledgment as to one of them will not take the other out of the operation of the statute. (*t*)

412. *Lost acknowledgments.*—Where a written

(*p*) Parke, B., *Humphreys v. Jones*, 14 M. & W. 3. *Waters v. Earl of Thanet*, 2 Q. B. 759.

(*q*) *Edmunds v. Downes*, 2 Cr. & M. 459. *Haydon v. Williams*, 7 Bing. 167. *Irving v. Veitch*, 3 M. & W. 112.

(*r*) *Williams v. Griffith*, 3 Exch. 343.

(*s*) *Gardner v. McMahon*, 3 Q. B. 568. *Cheslyn v. Dalby*, 4 Y. & C. 238. Instances of insufficient acknowledgments will be found in *Morrell v. Frith*, 3 M. & W. 403. *Poynder v. Bluck*, 5 Dowl. P. C. 570. *Hart v. Prendergast*, 14 M. & W. 741; 15 L. J., Ex. 224. *Edmonds v. Goater*, 21 L. J., Ch. 290. *Fearn v. Lewis*, 6 Bing. 349. *Routledge v. Ramsay*, 8 Ad. & E. 221. *Whippy v. Hillary*, 3 B. & Ad. 400. *Spong v. Wright*, 9 M. & W. 629. *Martin v. Knowles*, 1 N. & M. 422. *Cawley v. Furnell*, 20 L. J., C. P. 197. *Parmiter v. Parmiter*,

3 De G. F. & J. 461; 30 L. J., Ch. 508. *Richardson v. Barry*, 29 Beav. 22. *Hindmarsh, in re*, 1 Drew. & Sm. 129. *Buckmaster v. Russell*, 10 C. B., N. S. 745. *Cockrill v. Sparke*, 1 H. & C. 699; 32 L. J., Ex. 118. *Bush v. Martin*, 2 H. & C. 311; 33 L. J., Ex. 17. *Lowndes v. Garnett & Moseley Gold Mining Co.*, 33 L. J., Ch. 418. Instances of sufficient acknowledgments will be found in *Collis v. Stack*, 1 H. & N. 605. *Bird v. Gammon*, 3 Bing. N. C. 883. *Sidwell v. Mason*, 2 H. & N. 306; 26 L. J., Ex. 407. *College v. Horne*, 3 Bing. 119. *Gardner v. McMahon*, 3 Q. B. 561. *Dodson v. Mackey*, 8 Ad. & E. 225. *Lee v. Wilmot*, L. R., 1 Ex. 304; 35 L. J., Ex. 175; 4 H. & C. 469.

(*t*) *Robarts v. Robarts*, 1 M. & P. 489. *Rothery v. Munnings*, 1 B. & Ad. 15. *Phillips v. Broadley*, 9 Q. B. 744.

acknowledgment of the debt, signed by the debtor, had been lost, oral evidence of the contents of the writing and of the making of the acknowledgment, was permitted to be given. (*u*)

413. *Acknowledgment by one of several joint contractors, or by executors or administrators.*—Some doubt seems to have been entertained as to whether an acknowledgment in writing signed by the defendant, of his liability upon a bill of exchange or promissory note, will enure to the benefit of a subsequent indorsee or holder. It is apprehended that it would do so. (*x*) But it is clear that an admission, by the debtor, of his liability to a particular indorsee or holder of the bill, may be made under circumstances which do not extend the benefit of the admission to any other party than the one to whom it is made. (*y*) Formerly, an acknowledgment of a debt by one of several joint debtors operated as an acknowledgment by all, and was evidence of a promise on behalf of all; but such acknowledgments and promises do not now deprive the others, who are no parties to the acknowledgment or promise, of the benefit of the statute. (*z*) If one of several joint debtors promises by writing, signed by him, to pay his proportion of the joint debt, this is an additional new contract; and if the creditor sues him upon the original joint contract for the entire debt, and that action is defeated by a plea of the statute of limitations, he may then resort to the new contract for the recovery of the defendant's proportion of the joint debt. (*a*)

414. *Of the party to whom the acknowledgment is*

(*u*) Haydon v. Williams, 7 Bing. 163.

(*x*) Gale v. Capern, 1 Ad. & E. 104; 3 N. & M. 863. Crijns v. Davis, 12 M. & W. 165.

(*y*) Easterly v. Pullen, 3 Stark 136.

(*z*) 9 Geo. 4, c. 14, s. 1.

(*a*) Lechmere v. Fletcher, 1 Cr. & M. 636.

to be made.—It has been held that it is not necessary except in the case of actions on mortgage deeds or mortgage bonds, (*b*) that the acknowledgment should be made to the creditor himself, or to his agent but that a letter acknowledging the debt, addressed to a third party, or a signed acknowledgment in writing, not addressed to any one, will be sufficient. (*c*) The acknowledgment must be shown to have been written or signed before the commencement of the action. Where it is not made until after action is brought, it cannot prevent the operation of the statute. (*d*) If there is no date to the writing, the date may be supplied by oral testimony. (*e*)

415. *Exemption of the promise or acknowledgment from stamp duty.*—Promises to pay debts barred by the statute of limitations may, by the 9 Geo. 4, c. 14, s. 8, be given in evidence, unstamped, for the mere purpose of proving an acknowledgment of the debt, but not for the purpose of proving the debt itself, or the contract or promise which gives rise to the cause of action. (*f*) The exemption extends only to those written instruments which, but for the exemption, would require an agreement stamp. An unstamped or wrongly-stamped promissory note cannot, consequently, be given in evidence to establish the promise or acknowledgment. (*g*)

416. *Part payment of a principal debt, or payment of interest thereon.*—The proviso in the 9 Geo. 4, c. 14, s. 1, declaring that nothing contained in the act is to alter, take away, or lessen the effect of any pay-

(*b*) Forsyth v. Bristow, 8 Exch. 721;
22 L. J., Ex. 255.

(*d*) Bateman v. Pinder, 3 Q. B.
576.

(*c*) Mountstephen v. Brooke, 3 B. &
Ald. 141. Peters v. Brown, 4 Esp. 46.

(*e*) Edmunds v. Downes, 2 Cr. & M.
459.

Clark v. Hougham, 2 B. & C. 149.
Halliday v. Ward, 3 Campb. 32.

(*f*) Morris v. Dickson, 4 Ad. & E.
845.

Clarke v. Hooper, 4 M. & Sc. 355.

(*g*) Jones v. Ryder, 4 M. & W. 35.

ment of principal or interest, takes the case of payment of principal or interest altogether out of the operation of that statute, so as to enable payment to be proved as before the statute was passed. (*h*) In order to make a money payment a part payment within the statute, it must be shown to be a payment of a portion of an admitted debt. If the payment was intended by the debtor to be a payment of all that was due, the circumstance of the creditor's having received it and treated it as a part payment only, will not bring it within the statute. (*i*) If it stands ambiguous whether the payment be a part payment of an existing debt, more being admitted to be due, or whether it was intended by the party to satisfy the whole of the demand against him, the payment cannot operate as an admission of a debt so as to extend the period of limitation. (*k*) If the payment is accompanied by declarations and statements, from some of which it is to be inferred that a further debt still remained due, and from others that all further liability was repudiated, it is for a jury to draw their own inferences from the statements made, and adopt or reject what portions of them they think fit. (*l*) If there be two debts, one barred by the statute, and the other not barred, a general payment on account will not revive a debt barred by the statute, if it can be attributed to a debt that is not barred. Prima facie it is to be taken as payment on account of the sum that is not barred. (*m*) Payment of a dividend, by the inspectors,

(*h*) *Cleave v. Jones*, 6 Exch. 578; 20 L. J., Ex. 238.

(*i*) *Foster v. Dawber*, 6 Exch. 853; 20 L. J., Ex. 385. *Tippets v. Heane*, 1 C. M. & R. 252.

(*k*) *Waugh v. Cope*, 6 M. & W. 829. *Burkitt v. Blanshard*, 3 Exch. 89.

(*l*) *Wainman v. Kynman*, 1 Exch. 118; 16 L. J., Ex. 232. *Baildon v. Walton*, 1 Exch. 617.

(*m*) *Nash v. Hodgson*, 25 L. J., Ch. 188. *Walker v. Butler*, 6 Fll. & Bl 506. *Burn v. Boulton*, 2 C. B. 476. *Mills v. Fowkes*, 7 Sc. 444.

under a deed of inspectorship, executed for the purpose of administering the estate of a debtor, is not a sufficient part payment to take the debt out of the operation of the statute of limitations, so as to entitle the creditor to prove for the debt under a subsequent administration of the debtor's estate in bankruptcy. (*n*)

417. *Part payment by bill or note.*—If a bill of exchange is delivered as a part payment under circumstances which show that more was admitted to be due, the statute of limitations, as to the residue of the debt, will run from the time of the delivery of the bill. (*o*) If a debtor draws a bill of exchange and delivers it to the creditor to be applied in part payment of the debt, and the bill is paid, when due, by the drawee, the part payment operates from the time of the drawing and delivery of the bill, and not from the time of its payment. (*p*)

418. *Part payment by performance of service or by delivery of goods.*—The performance of any duty or service which the parties may agree to receive and treat as a part payment will operate as such. (*q*) Where goods and chattels were delivered and received by agreement of the parties in reduction of a debt, it was deemed to be a part payment within the proviso of the statute. (*r*) But if the delivery and acceptance are nothing more than the common case of two tradesmen, each selling goods to the other, without any agreement that the goods delivered on one side should be considered as payment for those

(*n*) Topping, *ex parte*, in *re Levey*, 34 L. J., Bk. 44.

(*o*) Turney *v.* Dodwell, 3 Ell. & Bl. 136; 23 L. J., Q. B. 137.

(*p*) Irving *v.* Veitch, 3 M. & W. 90. Gowen *v.* Forster, 3 B. & Ad. 507.

(*q*) Bodger *v.* Arch, 10 Exch. 341; 24 L. J., Ex. 22.

(*r*) Hart *v.* Nash, 2 C. M. & R. 337. Hooper *v.* Stephens, 4 Ad. & E. 71.

delivered on the other, the transaction will not amount to a payment within the proviso. (s)

419. *Part payment by adjustment and settlement of accounts.*—Where there are mutual accounts between parties, with items on both sides, and the parties go through such accounts, setting off one item due to one against another item due to another, and striking a balance, the party entitled to the balance will have six years from the period of the stating of the account for the recovery of such balance, the transaction amounting, as we have already seen, to a new contract between the parties, giving rise to a new cause of action, and not being a mere acknowledgment or admission of an existing debt. The plaintiff in such a case does not go upon the original debt at all. (t) Entries made in a book, by direction of a deceased party, of payment of interest, are admissible in evidence for the purpose of repelling the operation of the statute of limitations, whenever the entries are against the interest of the party directing them to be made. (u) A statement of account by a client to his attorney in his professional character, to enable the latter to lay a case before counsel, is a privileged communication, and cannot be used in evidence against the client. (x)

420. *Payment of interest* on a debt operates as an admission of the debt and an extension of the period of limitation; and oral evidence is admissible to show on what account the money was paid. (y) But the payment of interest, like part payment, must be such

(s) *Cottam v. Partridge*, 4 Sc. N. R. 834.

(t) *Ashby v. James*, 11 M. & W. 542. *Smith v. Forty*, 4 C. & P. 126.

Holmes v. Mackrell, 3 C. B., N. S. 789. *Amos v. Smith*, 1 H. & C. 238;

31 L. J., Ex. 423. •

(u) *Bradley v. James*, 13 C. B. 822, 22 L. J., C. P. 193.

(x) *Cleave v. Jones*, 7 Ex. 421.

(y) *Waters v. Tomkins*, 2 C. M. & R. 727. *Bevan v. Gething*, 3 Q. B.

740. *Burn v. Boulton*, 2 C. B. 484. *Evans v. Davies*, 4 Ad. & E. 841.

that a promise to pay the principal may be inferred in fact. Thus, where the maker of a note was sued for the interest then due upon it, and, judgment having been recovered against him, he paid the amount sued for, it was held that this payment of interest did not take the principal debt out of the operation of the statute. (s) If, however, the defendant admits the debt, and pays interest thereon, and at the same time declares that he will pay nothing further, the jury may give effect to the admission and payment, and disregard the declaration. It is for a jury to say, from what was said and done in connection with the payment, whether it was a payment of interest on an admitted debt, or whether the debt was repudiated, and had no existence, at the time of payment. (a) If the debt is secured, partly by bills and notes and simple contracts, and partly by bonds or mortgage deeds and specialty securities, and interest is paid on the whole debt generally, the time of limitation will be extended as to all the securities. (b) If a debtor pays a principal debt barred by the statute, and expressly refuses to pay interest, the payment of the principal will not revive the claim to the interest. (c) Payment of interest on bills or notes is an admission of continued liability down to the period of such payment of interest, and causes the time of limitation to run therefrom. (d) If indorsements on a bill or note of payment of interest or principal are put in evidence as an admission of the debt, they must be signed by the debtor, or have been made in his presence, or by his direction, or by some party who was acting as his

(s) *Morgan v. Rowlands*, L. R., 7 Q. B. 493, 41 L. J., Q. B. 187.

(a) *Wainman v. Kynman*, 1 Exch. 118; 26 L. J., Ex. 232. *Baldon v. Walton*, 1 Excl. 617.

(b) *Dowling v. Ford*, 11 M. & W. 329.

(c) *Collyer v. Willock*, 4 Bing. 313. (d) *Bamfield v. Tupper*, 7 Exch. 27. *Bealy v. Greenslade*, 2 Cr. & J. 61.

agent in the matter. (e) It is not essential that money should actually pass between the debtor and creditor to constitute a payment of interest. Where the debtor was about to pay the creditor, his father the interest due, but the father stopped him, and, writing a receipt for the money, gave it to the son's wife, saying that he would make her a present of the money, it was held that there was a sufficient payment. (f)

421. *Part payment by one of several joint and several debtors or co-contractors.*—Formerly, if one of several joint debtors, or one of several joint and several debtors or co-contractors, paid part of the debt due, or paid interest thereon, the payment was a payment by all, and extended the period of limitation as to all, although the payment was made by the one without the concurrence, or in fraud, of the others. But now, by the 19 & 20 Vict., c. 97, s. 14, it is enacted that two or more co-contractors or co-debtors, whether jointly or severally liable, or the executors or administrators of any contractor, shall not lose the benefit of the statute of limitations, and be rendered chargeable, by reason of payment of principal or interest, or other money, by another co-contractor or co-debtor, executor or administrator. A payment made before the passing of this statute is not operated upon by this section, which has no retrospective effect. (g)

422. *Payment by stranger and agents.*—Where a married woman, after her marriage, paid interest without the knowledge of her husband on a promissory note given by her whilst she was a feme sole, it

(e) 9 Geo. 4, ch. 14, s. 3. *Briggs v. Smith*, 1 H. & C. 238; 31 L. J., Ex. Wilson, 17 Beav. 330. *Bradley v.* 423.

James, ante, p. 307.

(g) *Jackson v. Woolley*, 8 Ell &

(f) *Maber v. Maber*, L. R., 2 Ex. Bl. 784; 27 L. J., Q. B. 448.

153; 36 L. J., Ex. 70. *Ainos v.*

was held that the cause of action upon the note could not be kept alive by any act of the wife during coverture, done without the knowledge and sanction of the husband. (*h*) Where a promissory note had been signed by the defendants, as churchwardens or overseers of a parish, and interest had been regularly paid upon the note by the overseers of the parish for the time being, it was held that it was for a jury to say whether the defendants had not constituted the churchwardens and overseers, for the time being, their agents for the payment of the interest. (*i*) If payment is made by one of several executors it must be made under circumstances from which the concurrence of the other executors would be implied, in order to keep alive the remedy against the assets in their hands. (*k*) Payment of interest on an Irish mortgage, made by a receiver appointed over the estates mortgaged, is payment by an agent of the party liable within the meaning of the 3 & 4 Wm. 4, c. 27, s. 40, and bars the statute. (*l*) Payment of interest by the devisees in trust of the real estate of a deceased covenantor does not bind the equitable tenant for life. (*m*)

423. *Payment to strangers and agents.*—A payment to a third person by direction of the creditor is a payment to the creditor himself; (*n*) and if money is lent by a trustee acting on behalf of the cestui que

(*h*) *Newe v. Hollands*, 21 L. J., Q. B. 289. *Pitman v. Foster*, 1 B. & C. 250.

(*i*) *Jones v. Hughes*, 5 Exch. 104; 19 L. J., Ex. 200. *Rew v. Pettet*, 1 Ad. & E. 200.

(*k*) *Scholey v. Walton*, 12 M. & W. 513. *Tullock v. Dunn*, R. & M. 416. As to proof of agency, see *Harding v. Edgecombe*, 28 L. J., Ex. 313. *Whit-*

ley v. Lowe, 25 Beav. 421; 2 De G. & J. 704.

(*l*) *Chinnery v. Evans*, 11 H. L. Cas. 115.

(*m*) *Coope v. Creswell*, L. R., 2 Ch. 112; 36 L. J., Ch. 114. And see *Pears v. Laing*, L. R., 12 Eq. 41; 40 L. J., Ch. 225.

(*n*) *Worthington v. Grimsditch*, 7 Q. B. 484.

trust, a payment to the latter is equivalent to a payment to the trustee. (o) Payment to a husband of interest which has accrued due upon the wife's chose in action is equivalent to payment to the wife; (p) and a payment to a person supposed by the debtor to be duly authorized to receive the money, but who had no authority to receive it, may be made as good a payment and acknowledgment under the statute as if the money had been paid to the party rightfully entitled. (q)

424. *Limitation of actions in respect of contracts made abroad.*—Where the law of prescription or limitation of a particular country not only extinguishes the right of action, but the claim or title or cause of action itself, and declares it a nullity after the lapse of the prescribed period, such law of prescription or limitation may be set up in any other country to which the parties may remove as an absolute bar by way of extinguishment, provided the parties have been resident within the foreign jurisdiction during the whole period of limitation, so that the law has actually operated upon the case as an extinguishment of the claim, and not merely as a limitation of the remedy. By the French law, all rights of action relative to letters of exchange and bills to order, subscribed by merchants, tradesmen, or bankers, or for matters of commerce, expire in five years, reckoning from the day of protest, or from the last suing out of any judicial process, if there has been no judgment, or if the debt has not been acknowledged by any separate act. But the alleged debtors are held, if required, to affirm on oath that they are no longer indebted, and

(o) *Meggison v. Harper*, 2 C. & M. 322.

(q) *Clark v. Hooper*, 10 Bing 480.

(p) *Hart v. Stephens*, 6 Q. B. 937.

their widows, heirs, &c., that they bona fide believe there is no longer anything due. The French law of limitation, therefore, does not extinguish or annul the contract, but operates upon the remedy only. If, therefore, a party who has contracted in France removes to this country, and is sued here upon the contract the action will be governed by the English, and not by the French, law of limitation of actions: for all that relates "ad litis ordinationem" is regulated by the law of the country where the action is brought. (r)

425. *Suspension of the statute.*—When a debtor takes out administration to his creditor, the running of the statute is suspended during the administration. (s)¹

(r) *Huber v. Steiner*, 2 Sc. 326. *Gibson v. Holland*, L. R., 1 C. P. 1; *British Linen Co. v. Drummond*, 10 35 L. J., C. P. 5. *Harris v. Quine*, B. & C. 903. *Leroux v. Brown*, 12 C. L. R., 4 Q. B. 653; 38 L. J., Q. B. 331. B. 801; 22 L. J., C. P. 1. *Ruckma-* (s) *Seagram v. Knight*, L. R., 2 Ch. *boye v. Mottichund*, 8 Moo. P. C. 4. 628; 36 L. J., Ch. 918.

¹ Consult as to the statutes of limitations of the various states:

Alabama—*Reves v. Flinn*, 47 Ala. 481; *Wise v. Falkner*, 45 Id. 471; *Taylor v. Perry*, 48 Id. 240; *Waller v. Nelson*, Id. 531.

Arkansas—*Rector v. Duball*, 27 Ark. 318; *Curnaw v. Clark*, Id. 500; *Byers v. Danley*, Id. 77.

California—*Ponce v. McElvy*, 4 Cal. 154; *Gardiner v. Schmaelzle*, Id. 588; *Gillespie v. Jones*, Id. 161; *Howell v. Rogers*, Id. 291; *Dorland v. Majilton*, Id. 480; *McManus v. O'Sullivan*, 48 Cal. 7; *Gratt v. Jones*, Id. 28; *Hagar v. Spect*, Id. 406; *Abby Homestead Association v. Willard*, Id. 614.

Connecticut—*Welles v. Russell*, 38 Conn. 193; *Beardsley v. Hall*, 36 Id. 270; *Lee v. Wyse*, 35 Id. 384.

Delaware—*Greenman v. Wilson's Executors*, 4 Houst. 14; *Prout's Admr. v. Coates*, 3 Id. 325.

Georgia—*West v. Rodahan*, 46 Ga. 553; *Hobes v. Cody*, 45 Id. 478; *Parker v. Irving*, 47 Id. 405; *Cade v. Burton*, 46 Id. 456; *Lopez v. Downing*, Id. 120; *Harrison v. Young*, 302, 479; *Black v. Burton*, Id. 362; *Cain v. Furlow*, Id. 674; *Wil-*

liamson v. Wardlaw, 426, 469a; Adams v. Davis, 47 Id. 339; Goodroe v. Neal, 45 Id. 109.

Illinois—Chiles v. Davis, 58 Ill. 411; Dalton v. Cain, 14 Wall. 472; Jaudon v. McDowell, 56 Ill. 53; Ross v. Coat, 58 Id. 53.

Indiana—Des Moines v. Harker, 34 Ind. 84; State v. Todd, 1 Biss. 69; Van Dorn v. Bodley, 38 Ind. 402; Harris v. Harris, Id. 427; Potter v. Smith, 36 Id. 231.

Iowa—Baker v. Johnson County, 33 Iowa, 151; Douglass v. Tullock, 34 Id. 262; Day v. Baldwin, Id. 380; Williams v. Allison, 33 Id. 278; Prescott v. Ganser, 34 Id. 175; Hurlburt v. Hopkins, 33 Id. 122.

Kansas—Howard v. Ritchie, 9 Kans. 104.

Louisiana—Brewer v. Kelly, 24 La. Ann. 246; Powell v. v. O'Neil, Id. 522; Wade v. Caspari, Id. 211; Levy v. Police Jury, Id.

Maine—Pettingill v. Pettingill, 60 Me. 411; Lime Rock, &c. Co. v. Hewitt, Id. 407.

Maryland—Thurston v. Blackiston, 36 Md. 501; Pairs v. Vickery, 37 Id. 467.

Massachusetts—Hunt v. Taylor, 108 Mass. 158; Burgess v. Keys, Id. 43.

Michigan—White v. Campbell, 25 Mich. 163.

Minnesota—Davenport v. Short, 17 Minn. 24; Taylor v. Parker, Id. 469.

Mississippi—Dinkins v. Bowers, 49 Miss. 219; Saunders v. Saunders, Id. 327; Rucks v. Taylor, Id. 552.

Missouri—School Directors v. Georges, 50 Mo. 194; Smith v. Ricords, 52 Id. 518; McKinzie v. Hill, 51 Id. 303; Hunter v. Hunter, 50 Id. 445; Tapley v. McPike, Id. 589.

Montana Territory—Coady v. Reins, 1 Mon. T. 424.

Nebraska—Kyger v. Ryley, 2 Neb. 20.

Nevada—Taylor v. Hendrie, 8 Nev. 243.

New Hampshire—Judge of Probate v. Lane, 51 N. H. 342.

New Jersey—Vaughan v. Hankinson's Adm'r, 35 N. J. L. 79; Horner v. Stillwell, Id. 307; Tarberrer v. Lawrence, 3 Harr. 262; Hale v. Lawrence, 1 Zab. 714; Raymond v. Leslie, 35 L. J. 472; Shreve v. Joyce, 36 N. J. L. 44.

New York—Dunning v. Ocean National Bank, 6 Lans. 296; Davy v. Field, 1 Abb. (N. Y.) App. Dec. 490; Hope, &c. Ins. Co. v. Perkins, 2 Id. 383; Mann v. Palmer, Id. 162; Peters v. Decaplain, 49 N. Y. 262; Mann v. Fairchild, 3 Ab' (N. Y.) App. Dec. 152; Clark v. Ford, 1 Id. 359; Prindle v. Beveridge, 7 Lans. 225; Dunham v. Sage, 52 N. Y. 229; Bucklin

v. Bucklin, 1 Abb. (N. Y.) App. Dec. 242; *Mallory v. Tioga R. R. Co.*, 3 Id. 139; *McQueen v. Babcock*, Id. 129.

Ohio—*Keithler v. Foster*, 22 Ohio St. 27; *McNeely v. Langen*, Id. 32; *Longworth v. Taylor*, 2 Cinc. (Ohio) 39.

Pennsylvania—*Schoch v. Garrett*, 69 Pa. St. 144; *Bradford v. Guthrie*, 3 Pittsb. 213; *Morris's Appeal*, 71 Pa. St. 106; *Bush v. Stowell*, 71 Id. 208.

Rhode Island—*Bosworth v. Smith*, 9 R. I. 67.

South Carolina—*Massey v. Duren*, 3 S. C. 34.

Tennessee—*Judge v. Barnes*, 4 Heisk. 570; *Perkins v. Moss*, 3 Id. 671; *Bothe v. Allen*, 4 Id. 258.

Texas—*McMillan v. Werney*, 35 Tex. 419; *Williams v. Durst*, Id. 421.

Vermont—*Blain v. Blain*, 45 Vt. 538; *Harris v. Harris*, 70 Pa. St. 170.

Virginia—*Cline v. Catron*, 22 Gratt. 378.

Wisconsin—*Sydnor v. Palmer*, 29 Wis. 226; *Cutler v. Hurlbut*, Id. 152; *McEvoy v. Lloyd*, 31 Id. 142; *Large v. Large* 27 Id. 60; *Holden v. Meadows*, 31 Id. 284; *Hall v. Gilbert*, Id. 691.

As to the conflict of different statutes of limitations, see *Bigelow v. Ames*, 18 Minn. 537; *Coady v. Reines*, 1 Mon. T. 424; *Brown v. Parker*, 28 Wis. 21. And see generally, *Wright v. Fullerton*, 2 Biss. 336; *Cleveland Ins. Co. v. Reed*, 1 Id. 180; *Day v. Baldwin*, 34 Iowa, 380; *Hubbell v. Sibley*, 50 N. Y. 468; *Hunter v. Hunter*, 50 Mo. 445; *Prundle v. Leveridge*, 7 Lans. 225; *Pierce v. Chace*, 108 Mass. 254; *Pairo v. Vickery*, 37 Md. 467; *Stanley v. Stanton*, 36 Ind. 445; *Wade v. Caspair* 24 La. Ann. 211; *Massey v. Adams*, 3 S. C. 254; *Shipp v. Wingfield*, 46 Ga. 593; *Isaacs v. Price*, 2 Dall. 347; *Tiffin v. Seabo*, 52 Mo. 49; *St. Romes v. Carondelet Canal, &c. Co.*, 24 La. Ann. 331; *Rogers v. Gibbs*, Id. 467; *Capertown v. Bowyer*, 14 Wall. 216; *First National Bank v. Ballou*, 49 N. Y. 155; *Pitts v. Hunt*, 6 Lans. 146; *Vaughan v. Hankinson*, 35 N. J. L. 79; *Kyger v. Ryley*, 2 Neb. 20; *Phillips v. Mahan*, 52 Mo. 197; *Black v. Dorman*, 51 Id. 31; *Price v. Price*, 34 Iowa, 404; *Taylor v. Hendrie*, 8 Nev. 243; *Patton v. Hassenger*, 69 Pa. St. 305; *Collins v. Bane*, 34 Iowa, 385. The statutes of limitation of the various states did not run during the war of the rebellion of 1861-65, against the right of action of parties upon contracts made previous to, and maturing after the commencement of the war. *Brown v. Hiatts*, 15 Wall. 177.

CHAPTER V.

THE TRANSFER OF CONTRACTS.

SECTION I.

TRANSFER BY ASSIGNMENT.

426. *Of the assignment of personal contracts.*—The common law, in times past, discountenanced the assignment of all rights and causes of action, as tending to increase maintenance and litigation, and would not, consequently, suffer the right to the fulfillment of a contract of a personal nature to be transferred from hand to hand. The performance of a contract for work might be delegated to a subordinate agent or servant, but not the right to sue upon the contract. Thus, where A, being employed by the defendant to transport goods to a foreign market, delegated the entire employment to the plaintiff, and the plaintiff, having performed all that A had undertaken to perform, brought his action against the defendant for the stipulated remuneration, it was held that there was no privity between the plaintiff and the defendant; that he was not a party to the contract, and could not sue upon it. (a) If an order was given to A for the supply of goods, and B stepped in and executed it by the authority of A, he was taken to execute as the agent of A, and could not himself sue for the price of

(a) *Schmalzing v. Thomlinson*, 6 Taunt. 147.

the goods, unless, before the goods had been received and consumed by the intended purchaser, he had given notice to the latter that he had himself supplied them, and looked to him for payment. (*b*) If, after the receipt of such a notice, the party giving the order accepted the goods, he was then taken to have entered into a new contract for the purchase of them from the party to whom the execution of the original order had been delegated. But latterly the ancient rule of law had evaporated to a mere shadow. It no longer prevented the assignee from suing, but regulated merely the form of his action. He could not sue in his own name; but he was, in general, permitted to bring his action and to recover in the name of the original assignor, the party with whom the contract was entered into. (*c*)

In modern times, too, the legislature, yielding to the wants and necessities of mankind, had sanctioned the assignment of certain bonds and contracts, and authorized the assignees to sue upon them in their own names, such as bail bonds, (*d*) replevin bonds, (*e*) India bonds, railway bonds, exchequer bonds, (*f*) administration bonds, (*g*) bills of lading, (*h*) and policies of marine (*i*) and life (*k*) assurance. The assignee of a Scotch bond, which is a negotiable instrument in Scotland, might maintain an action of

(*b*) *Boulton v. Jones*, 2 H. & N. 564; 27 L. J., Ex. 117. *Hardman v. Booth*, H. & C. 803; 32 L. J., Ex. 105.

(*c*) *Master v. Miller*, 4 T. R. 340. *Legh v. Legh*, 1 B. & P. 447. *Alner v. George*, 1 Campb. 392. *Brandt v. Heatig*, 2 Moore, 184. *Pickford v. Ewington*, 4 Dowl. P. C. 453. *Morrison v. Parsons*, 2 Taunt. 407.

(*d*) 4 Anne, c. 16, s. 20.

(*e*) *Thompson v. Farden*, 1 M. & Gr. 535. *Dias v. Freeman*, 5 T. R. 195.

(*f*) *Glyn v. Baker*, 13 East, 509. *Vertue v. East Angl. &c.*, 5 Exch. 280; 19 L. J., Ex. 235.

(*g*) 20 & 21 Vict. c. 77, ss. 81, 83.

(*h*) 18 & 19 Vict. c. 111.

(*i*) 31 & 32 Vict. c. 86. A policy may be assigned under this Act after a loss has occurred. *Lloyd v. Fleming*, L. R., 7 Q. B. 299; 41 L. J., Q. B. 93.

(*k*) 30 & 31 Vict. c. 144.

assumpsit in this country against the obligor upon the implied promise raised by the indorsement and assignment to him of the bond; (*l*) and as the assignment of judgments by confession is authorized by act of parliament in Ireland, the assignee of such a judgment might maintain an action in this country upon it in his own name. (*m*)

The legislature had also authorized the assignee of the choses in action of a joint-stock company in liquidation, (*n*) and the assignee of the book-debts of a bankrupt, (*o*) to bring actions for such choses in action or book-debts in his own name. And now, by the supreme court of judicature act, (*p*) any debt or other chose in action may be assigned absolutely by writing under the hand of the assignor; and such assignment, after express notice in writing has been given to the debtor, will be effectual in law (subject to all equities which would have been entitled to priority over the assignee if that act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor. Previously to the passing of this act, the general rule of the court of equity was that the assignee of a chose in action took it subject to all the equities between the original parties to the contract, (*q*)¹ and this will still prevail as the

(*l*) *Innes v. Dunlop*, 8 T. R. 595.

(*m*) *O'Callaghan v. Thomand*, 3 Taunt. 82.

(*n*) 25 & 26 Vict. c. 89, ss. 95, 157.

(*o*) Bankruptcy Act of 1869, s. 111.

(*p*) 36 & 37 Vict. c. 66, s. 24 (6).

(*q*) *In re Natal Investment Co., L. R.*, 3 Ch. 355; 37 L. J., Ch. 362. *Rodger v. The Comptoir d'Escompt de Paris*, L. R., 2 P. C. 393; 38 L. J., P. C. 30.

¹ *Willis v. Twambly*, 13 Mass. 204; *Bush v. Lathrop*, 22 N. Y. 535; *Crocker v. Whitney*, 10 Mass. 316, 319; *Mowry v.*

general rule; but the parties to the original contract may, by express stipulation or by implication arising from their conduct, agree that the chose in action may be assigned free from such equities; and in that case an assignee will take the chose in action discharged from such equities accordingly, (r) or he may be released therefrom by the conduct of the debtor after the assignment. (s) When the assignor of a debt has collateral securities for the debt, the assignee will be entitled to the full benefit of such securities, unless it is otherwise agreed between the parties. (t)¹

427. What is an assignment.—As a general rule,

(r) In *re Agra & Masterman's* Eq. 458; 39 L. J., Ch. 829. *Dickson Bank, L. R.*, 2 Ch. 391; 36 L. J., Ch. 222. In *re Blakely Ordnance Co., L. R.*, 3 Ch. 154; 37 L. J., Ch. 418. In *re General Estates Co., Ex Parte City Bank, L. R.*, 3 Ch. 758. In *re Northern Assam Tea Co., L. R.*, 10

Eq. 458; 39 L. J., Ch. 829. *Dickson v. Swansea Vale Ry. Co., L. R.*, 4 Q. B. 44; 38 L. J., Q. B. 17.

(s) *Higgs v. The Northern Assam Tea Co., L. R.*, 4 Ex. 387; 38 L. J., Ex. 233.

(t) *Story's Eq. Jur.* § 1047 a.

Todd, 12 Id. 281; *Jones v. Witter*, 13 Id. 304; *Blydenburgh v. Thayer*, 1 Abb. (N. Y.) App. Dec. 186; *Martin v. Richardson*, 68 N. C. 255; *Parish v. Brooks*, 4 Brews. (Pa.) 154; *Goodwin v. Cunningham*, 12 Mass. 193; *Green v. Hatch*, Id. 195; *Jenkins v. Brewster*, 14 Id. 291; *Phillips v. Bank of Lewiston*, 18 Penn. St. 394; *Conant v. Seneca County Bank*, 1 Ohio St. 298; *Ainslie v. Boynton*, 2 Barb. 258; *Davenport v. Woodbridge*, 8 Greenl. 17; *Bean v. Simpson*, 16 Me. 49; *Johnson v. Bloodgood*, 1 Johns. Cas. 51; *Anderson v. Van Alen*, 12 Johns. 343; *Prescott v. Hull*, 17 Id. 284, 292; *Ford v. Stuart*, 19 Id. 342; *Thompson v. Emery*, 7 Foster (N. H.) 269; *Tibbits v. George*, 5 A. & E. 107; *Dunn v. Snell*, 15 Mass. 481; *Whittle v. Skinner*, 23 Vt. 531; *Palmer v. Merrill*, 6 Cush. 282.

¹ *Blydenburgh v. Thayer*, 1 Abb. (N. Y.) App. Dec. 156; *Caldwell v. Hartupee*, 70 Pa. St. 74; *Martin v. Richardson*, 68 N. C. 255; *Parrish v. Brooks*, 4 Brews. (Pa.) 154; *Atkinson v. Runnells*, 60 Me. 440; *Hamilton v. Marks*, 52 Mo. 78; *Bishop v. Garcia*, 14 Abb. (N. Y.) Pr. N. S. 69; *Farmers' Bank v. Wilson*, 3 Houst. 220; *Tatt v. Couzins*, 50 Mo. 152; *Burgess v. Cave*, 52 Id. 93; *Newman v. Springfield Fire Ins. Co.*, 17 Minn. 123.

anything written, said, or done, in pursuance of an agreement, and for valuable consideration, or in consideration of an antecedent debt, to place a chose in action out of the control of the creditor, and appropriate it in favor of another person, amounts to an equitable assignment. (*u*) So that an order given by a debtor to his creditor upon a person owing money to such debtor, directing such person to pay the creditor out of such money, will amount to an irrevocable equitable assignment of such money, or a sufficient part thereof, if made in consequence of a direct agreement; and if such money is handed over to the assignor by the person so ordered to pay, he will be made to pay it over again to the assignee. (*x*) But a promise to pay money when the debtor receives a debt due to him from a third person, does not constitute an equitable assignment, so as to charge the debt in the hands of such third person. (*y*)¹

428. Notice of assignment. — When a chose in action has been assigned, notice must be given to the debtor in order to perfect the interest of the assignee, and secure him against any claims by subsequent assignees.² Notice of the assignment of a trade-debt not given to the debtor until after bankruptcy of the assignor is insufficient to take it out of the order and disposition of the bankrupt; and the title of the trustee will prevail over that of the assignee. (*z*) And

(*u*) Spence's Eq. Jur., vol. 2, pp. 885, 860, 861, 907. *Chowne v. Baylis*, 31 Beav. 351. (*y*) *Field v. Megaw*, L. R., 4 C. P. 660.

(*s*) *In re Webb*, 36 L. J., Ch. 341; *Barnes v. Pinkney*, 36 L. J., Ch. p. 246.

(*x*) *Jones v. Farrell*, 1 D. & J. 208. 815.

¹ *Augar v. N. Y. Belting, &c. Co.*, 39 Conn. 536; *Garland v. Harrington*, 51 N. H. 409; *Deronge v. Elliot*, 23 N. J. Eq. 486; *Billings v. O'Brien*, 45 How. (N. Y.) Pr. 392; 14 Abb. Pr. N. S. 238; *D'Wolf v. Gardiner*, 1 R. I. 145.

² See *Atkinson v. Runnels*, 60 Me. 440; *Hamilton v.*

it is immaterial that the notice was given by the assignee to the debtor before the latter had notice of the bankruptcy. (a) By an assignment of a bond, policy of insurance, or other instrument of contract, the right of property in the instrument itself passes to the assignee, so that an action is maintainable for the recovery of possession of the document. (b) ¹

429. *When an assignment of a chose in action may be made the foundation of a new contract.*—When the assignment of a personal contract is defective in form merely, any promise, by the person liable upon the contract, to pay the demand or satisfy the claim, in consideration that the assignee will give him time for payment, or forbear for a particular period to sue him, will enable the assignee to maintain an action in his own name upon such new contract or promise. (c) ²

(a) In re Tichener, 35 Beav. 317.

(b) Watson v. McLean, 1 Ell. Bl. & Ell. 77.

(c) Morton v. Burn, 7 Ad. & E. 19. Reynolds v. Prosser, Hardr. 71. Forth v. Stanton, 1 Saund. 210, n. 1, n. 2. Jeffs v. Day, L. R., 1 Q. B. 372.

Marks, 52 Mo. 78; Bishop v. Garcia, 14 Abb. (N. Y.) Pr. N. S. 69.

¹ Hall v. Robinson, 2 Comst. 293; United States v. Buford, 3 Pet. 30; Anon. Freem. Ch. (Miss.) 145; Hinkle v. Wanzer, 17 How. 353; Bigelow v. Willson, 1 Pick. 485, 493; Dix v. Cobb, 4 Mass. 508, 511; Haskell v. Hilton, 30 Me. 419; Miller v. Whittier, 32 Id. 203; Moor v. Veazie, Id. 342; Ex parte Foster, 2 Story, 133.

² Carter v. United States Ins. Co., 1 Johns. Ch. 463; Ontario Bank v. Mumford, 2 Barb. Ch. 596). And in Maryland (Gover v. Christie, 2 Har. & J. 67; Adair v. Winchester, 7 G. & J. 114). And see, generally, as to what choses in action are assignable, Smiley v. Bell, Mart. & Y. 378; Mosely v. Boush, 4 Rand. 392; Winn v. Bowles, 6 Munf. 23; Andrews v. Bond, 16 Barb. 633; Brackett v. Blake, 7 Metc. 335; Morrison v. Deaderick, 10 Humph. 342; Gardner v. Adams, 12 Wend. 297; Thurman v. Wells, 18 Barb. 500; Cook v. Newman, 8 179.

Pr. 523. *Comegys v. Vasse*, 1 Pet. 193, 213; *Hall v. Robinson*, 2 Comst. 293; *Dix v. Cobb*, 4 Mass. 508; *Crocker v. Whitney*, 10 Id. 316; *Cutts v. Perkins*, 12 Id. 206; *Brown v. Maine Bank*, 11 Id. 153; *Dunn v. Snell*, 15 Id. 481; *Skinner v. Somes*, 14 Id. 107; *Watertown v. White*, 13 Id. 477; *Hall v. Gardner*, 11 Id. 172; *Davis v. Coburn*, 8 Id. 299; *Clement v. Clement*, 8 N. H. 472; *Graham v. Kinder*, 11 B. Mon. 60; *Balch v. Smith*, 12 N. H. 437; *Bigelow v. Willson*, 1 Pick. 485; *Usher v. De Wolf*, 13 Mass. 290; *Perkins v. Parker*, 1 Id. 117; *Wood v. Partridge*, 11 Id. 488; in this case, *Parker, C. J.*, said: "It is uniformly holden, that an assignment of an instrument under seal must be by deed; in other words, that the instrument of transfer must be of as high a nature as the instrument transferred." *Coolidge v. Ruggles*, 15 Id. 387; *Palmer v. Merrill*, 6 Cush. 282; *Freeman v. Perry*, 22 Conn. 617; *Hedges v. Sealy*, 9 Barb. 214; *Mangles v. Dixon*, 18 E. L. & E. 82; *Bartlett v. Pearson*, 29 Me. 9, 15; *Guerrey v. Perryman*, 6 Ga. 119; *Wood v. Perry*, 1 Barb. 114, 131; *Commercial Bank v. Colt*, 15 Id. 506; *Sanborn v. Little*, 3 N. H. 539; *Norton v. Rose*, 2 Wash. (Va.) 233; *Dawes v. Boylston*, 9 Mass. 337, 346; *Cutts v. Perkins*, 12 Id. 206, 210; *Dix v. Cobb*, 4 Id. 508, 511; *Brown v. Maine Bank*, 11 Id. 153; *Webb v. Steele*, 13 N. H. 230, 236; *Duncklee v. Greenfield Steam Mill Co.* 3 Foster (N. H.) 245; *Anderson v. Miller*, 7 Sm. & M. 586; *Parker v. Kelley*, 10 Id. 184; *Winch v. Keely*, 1 T. R. 619; *Blin v. Pierce*, 20 Vt. 25; *Blake v. Buchanan*, 22 Id. 548; *Parsons v. Woodward*, 2 N. J. 196; *Jewett v. Dockray*, 34 Me. 45.

"It was once held that the assignment of an instrument must be of as high a nature as the instrument assigned. But this rule has been very much relaxed, if not overthrown; and indeed it has been determined that the equitable interest in a chose in action may be assigned for a valuable consideration by a mere delivery of the evidence of the contract; and that it is not necessary that the assignment should be in writing. So the equitable interest in a judgment may be assigned by a delivery of the execution. But a mere agreement to assign, without any delivery, actual or symbolical, of the writing evidencing the debt; or an indorsement upon the instrument directing the debtor to pay a portion of the amount due, to a third person, such indorsement being notified to the debtor, but the writing remaining in the hands of the creditor, does not constitute a sufficient assignment." 1 *Parsons on Contracts*, p. 228, citing *Willis v. Twambly*, 13 Mass. 204; *Bush v. Lathrop*, 22 N. Y. (8 Smith), 535; *Crocker v. Whitney*, 10 Mass. 316, 319; *Mowry v. Todd*, 12 Id. 281; *Jones v. Witter*,

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13 Id. 304; Fay v. Jones, 18 Barb. 340; Risley v. Risley, 11 Rob. (La.) 298; Small v. Browder, 11 B. Mon. 212; Clodfelter v. Cox, 1 Sneed, 330; Fanton v. Fairfield County Bank, 23 Conn. 485.

SECTION II.

OF COVENANTS RUNNING WITH THE LAND.

430. *Covenants running with land* are transferable; they pass from hand to hand with the interest in the realty to which they are annexed, and are called "real contracts." To enable a covenant to run with the land, it is not necessary that the covenantor should be possessed of any estate in the land; but the covenantee must be clothed with some transferable interest therein, to which the covenant can be attached; for otherwise the covenant is a mere personal covenant. (*d*) If, therefore, the covenantee is a mortgagor in fee, or a cestui que trust, the covenants are personal covenants, and do not run with the land, as the covenantee has no estate recognized by law in the land to which the covenants can be annexed. (*e*) A covenant cannot run with a ship, or any personal perishable chattel. (*f*)¹

431. *Privity of estate and privity of contract.*—Covenants entered into by owners of real property,

(*d*) Co. Litt. 395. a.

Whitton v. Peacock, 2 Sc. 630; 2

(*e*) Webb v. Russell, 3 T. R. 393. Bing. N. C. 411.

(*f*) Splidt v. Bowles, 10 East, 279.

¹ Dorsey v. St. Louis, &c. R. R. Co. 58 Ill. 65; Crisfield v. Storr, 36 Md. 129; Bronson v. Coffin, 108 Mass. 174; Western, &c. R. R. Co. v. Orendorf, 33 Md. 328; Powell v. Stowers, 47 Miss. 577; Erie R. R. Co. v. Union Locomotive Co., &c. 35 N. J. L. 240. See *Holford v. Hatch*, Doug. 183; *Palmer v. Edwards*, Id. 187, n.; *Van Rensselaer v. Gallup*, 5 Den. 454; *Astor v. Miller*, 2 Paige, 68, 78; *Van Horne v. Crain*, 1 Paige, 455.

who convey away their entire interest in the land to the covenantee, are annexed to the estate so transferred, and pass to the assignee of that estate, so as to give him an action upon them against the covenantor, his real and personal representatives. Thus, if A, seized of lands in fee, conveys his estate and interest by deed to B, and covenants with B to make further assurance, and B then conveys to C, who conveys to D, D may require A to make further assurance to him of the lands according to the covenant, and on his refusal may maintain an action against him. (*g*) So, if two copartners make partition of lands, and the one covenants with the other and her heirs to acquit her and her heirs of a certain suit issuing out of the lands, the assignee of the estate of the covenantee shall have an action upon the covenant; (*h*) and the same transfer of the right of action upon the covenant prevails, whether the interest conveyed by the covenantor be an estate of inheritance in the land, or a chattel real only. (*i*) If a man, too, purports to grant lands to another in fee, by such conveyance as will pass a fee, and covenants that he is seized in fee, and hath good right to convey, and it subsequently appears that at the time of the conveyance he was not seized in fee, and had not a right to convey, and no fee in the lands passed to the covenantee, yet the assignee of the covenantee who takes such estate and interest in the land as did pass to the covenantee, and who would have had the benefit of the covenant if it had been fulfilled, shall have an action upon it against the covenantor, to recover damages for the breach, the intent of the

(*g*) *Middlemore v. Goodale*, Cro. Car. 503, 505.

(*h*) Co. Litt. 385, a.

(*i*) *Lewis v. Campbell*, 3 Moore, 35. *Campbell v. Lewis*, 3 B. & Ald. 392. *Simpson v. Clayton*, 4 Bing N. C. 756.

law in all these cases being "to give the damages to the party grieved." (*k*)¹

But covenants entered into by the owners of land with persons who have no estate or interest at all in the land are not, it seems, annexed to the estate of the covenantor, and do not run with the land, so as to charge the assignees of the covenantor with the burden of the performance of them. If the owner of an estate of inheritance in land, for example, covenants with a stranger who has no interest at all in the soil, that the land holden by the covenantor shall never be built upon, or never planted or inclosed, or that it shall only be used or enjoyed by the covenantor in some particular manner, the covenant is a mere personal covenant. (*l*) So also a covenant by the purchaser with the vendor of copyhold land, that the vendor shall be able to work mines underneath the land sold without incurring any liability for injury to the surface, does not run with the land. (*m*) If, however, a party buys an estate, and accepts a conveyance with full acknowledge of the existence of a covenant or agreement of this description, he may be compelled to fulfill it. (*n*) And, as a purchaser who does not enquire into his vendor's title is affected with notice of

(*k*) *Jones v. King*, 4 M. & S. 188.

(*m*) *Richards v. Harper*, L. R., 1

(*l*) *Keppell v. Bailey*, 2 Myl. & K.

Ex. 190; 4 H. & C. 55; 35 L. J., Ex.

538; 1 Smith's L. C. 70, 71, 5th edit.

130.

Ackroyd v. Smith, 10 C. B. 164; 19

(*n*) *Western v. McDermott*, L. R.,

L. J., C. P. 315.

2 Ch. 72; 36 L. J., Ch. 76. *Jay v.*

¹ See *Ingalls v. Eaton*, 25 Mich. 32; *Lacy v. Marnan*, 37 Ind. 168; *Dale v. Shively*, 8 Kan. 276; *Farmers' Bank v. Glenn*, 68 N. C. 35; *Salmon v. Vallejo*, 41 Cal. 481; *Scott v. Scott*, 70 Pa. St. 244; *Peck v. Jones*, Id. 83; *Terry v. Drabensadt*, 68 Pa. St. 400; *Southerland v. Stout*, 68 N. C. 446; *Dalton v. Bowker*, 8 Nev. 190; *Taylor v. Holter*, 1 Mon. T. 688; *Lamb v. Wakefield*, 1 Sawyer, 251; *Crisfield v. Swor*, 36 Md. 129.

what appears upon it, he may, in some cases, be bound by a covenant of this description, even without knowledge of its existence. Thus, where the owner of a freehold house, in the conveyance to himself, had entered into a covenant with the plaintiff, who was a previous owner, that the building should not be used as a beer-shop, and the house was afterwards let to the defendant as tenant from year to year, without express notice of the covenant, it was held that the defendant was bound by it. (o) But where neither the original conveyance nor a subsequent assignment to the landlord of the defendant, contained any reference to a separate covenant entered into between the original grantor and grantee, and the landlord falsely stated that he was not aware of the existence of the covenant, it was held that no relief could be had against the tenant, who had opened a public-house, because if he had asked his landlord he would have been told there was no restriction, and if he had seen the conveyance he would have found none; and it was remarked that the doctrine of constructive notice had already been carried far enough. (p)

A restrictive covenant in an assignment of a lease may be enforced by the covenantee against persons with constructive notice, though he has no reversion. (q)

432. Covenants between landlord and tenant, or reversioner and lessee, affecting the value or enjoyment of the property by the lessee during the term, are annexed to the estate granted, and run with the

Richardson, 30 Beav. 563; 31 L. J., 39 L. J., Ch. 405. Keates v. Lyon, L. Ch. 398. Catt v. Tourle, L. R., 4 Ch. R., 4 Ch. 222; 38 L. J., Ch. 357.

656; 38 L. J. Ch. 665.

(o) Wilson v. Hart, L. R., 1 Ch. 463; 35 L. J., Ch. 569. Fielden v.

Slater, L. R., 7 Eq. 523; 38 L. J., Ch.

379. Jones v. Bone, L. R., 9 Eq. 674;

(p) Carter v. Williams, L. R., 9 Eq.

678; 39 L. J., Ch. 560.

(q) Clements v. Welles, L. R., 1 Eq. 200; 35 L. J., Ch. 265.

land as long as that estate continues; and the right of action upon them in case of breach vests in the assignee of the term.¹ Such are covenants by the lessor to repair, or to grant estovers for the repair and maintenance of the demised tenements, or for burning within the house during the term; (*r*) to cleanse and repair water-causes; (*s*) to supply the demised premises with water; (*t*) to acquit the land of certain suits and charges; (*u*) also covenants for renewal, and provisoes for re-entry or defeasance of the estate granted; (*x*) covenants for quiet enjoyment; (*y*) and all the usual covenants for title. "And of these covenants assignees in deed or in law, and assignees of assignees in infinitum, (*z*) shall take advantage; also assignees of executors or administrators, tenants by statute or elegit, or after a sale upon a fieri facias, or a husband in right of his wife; any one of these, and any other that shall come lawfully to a term unto which such a covenant is incident, albeit he be not named therein, yet may he take advantage thereof" (*a*)

"If, on the other hand, the lessee enters into similar covenants with the lessor, and afterwards assigns over his estate, the assignee will be responsible for all

(*r*) *Spencer's Case*, 5 Co. 17, b.
Bac. Abr. Covt. E. 5.

(*s*) *Holmes v. Buckley*, Prec. Ch. 39.

(*t*) *Jourdain v. Wilson*, 4 B. & Ald.
266.

(*u*) 5 Rep. 18 a.

(*x*) *Roe v. Hayley*, 12 East, 468.

(*y*) *Williams v. Burrell*, 1 C. B.
429.

(*z*) *Moule v. Garratt*, L. R., 5 Ex.
132; *Id.* 7 Ex. 101; 39 L. J., Ex. 69;
41 L. J., Ex. 62.

(*a*) *Shep. Touch.* ch. 7.

¹ See *Springer v. Phillips*, 71 Pa. St. 60; *Johnson v. Muzzy*, 45 Vt. 419; *Hinsdale v. Humphrey*, 15 Conn. 432; and see *Van Rensselaer v. Jones*, 2 Barb. 643; *Suydam v. Jones*, 10 Wend. 180; *Morse v. Gainer*, 1 Strobh. (S. C.) 514; *Chrisfield v. Storr*, 36 Md. 129; *Hagar v. Buck*, 45 Vt. 275; *Worthington v. Hewes*, 19 Ohio St. 66; *Winfield v. Henning*, 21 N. J. Eq. 188; *Graves v. Mattingly*, 9 Bush. (Ky.) 361; *Maguire v. Riggans*, 442 Mo. 51.

breaches of covenant that accrued during the time the term or estate continued vested in him, (*b*) although the covenant wants the word assigns, and although he has never entered and taken possession of the land; (*c*) for by taking the estate he makes himself subject to the covenants, *quia transit terra cum onere*." (*d*) But this liability is extinguished as soon as the privity of estate is destroyed; and the assignee, consequently, may get rid of the burden of the performance of the covenant at any time by simply assigning over his estate. (*e*) He cannot, by the assignment, release himself from liability in respect of actually existing breaches; (*f*) but he escapes from all responsibility in respect of breaches afterwards accruing, though his assignee be a mere pauper or an insolvent. (*g*) This, however, is not the case with the original lessee; the latter remains liable upon the covenants he himself has expressly entered into with the lessor; for the privity of contract, as between him and the lessor, is held to remain, although the privity of estate has been destroyed by the assignment of the estate; (*h*) and he and his personal representatives (post, sect. 3) may consequently be sued upon the covenants by the lessor; for, "though the assignee becomes liable to the lessor for the performance of all the covenants which run with the land, yet the lessee is also liable, in the nature of a surety, for the performance of the same covenants"; (*i*) and if, by reason of the non-performance of the covenants by the as-

(*b*) *Harley v. King*, 2 C. M. & R. 18.

(*c*) *Williams v. Bosanquet*, 3 Moore, 500.

(*d*) *Bally v. Wells*, 3 Wils. 29. *Tatem v. Chaplin*, 2 H. Bl. 133.

(*e*) *Paul v. Nurse*, 8 B. & C. 486.

(*f*) *Harley v. King*, 5 Tyr. 692.

(*g*) *Lekeux v. Nash*, Str. 1221.

Taylor v. Shum, 1 B. & P. 21. *Onslow*

v. Corrie, 2 Madd. 330. *Valliant v. Dodemede*, 2 Atk. 546.

(*h*) *Barnard v. Godscall*, Cro. Jac. 309.

(*i*) *Parke, v. B.*, *Humble v. Langston*, 7 M. & W. 530. *Bickford v. Parson*, 5 C. B. 929.

signee during the continuance of his interest in the premises, the burden of the fulfillment of them is thrown upon the lessee, and the latter is compelled by the lessor to do that which the assignee, by taking the assignment, has impliedly undertaken to do as between himself and the lessee, the latter may maintain an action against him to recover the amount paid to the lessor, and all the costs and damages he has been put to by reason of the non-fulfillment of the covenant on the part of the assignee. (*k*) But in order to render the assignee liable upon the covenants, he must be clothed with the same estate as that which the lessee had in the land at the time the covenants were entered into. An under-lessee, therefore, is not responsible upon the covenants, inasmuch as he is not possessed of the estate to which they are annexed. (*l*)

433. *Covenants real annexed to reversionary estates.*—Covenants, however, were held at common law to run with the estate of the lessee only—not with the estate of the reversioner. Consequently, although the assignee of the lessee was held to be entitled to sue upon them, yet the assignee of the reversion had no such remedy, and could not maintain an action upon any express covenants made between the lessor and the lessee in respect of the land. Thus, if the owner in fee made a lease, and obtained from the lessee covenants to repair, to manure the lands, or to cultivate them in a particular manner, &c., and then assigned his reversion, the assignee had no title to sue upon these express covenants. This inconvenience led to the passing of the 32 Hen. 8, c. 34, which places the assignee of the reversion, and the lessee and his

(*k*) *Burnett v. Lynch*, 5 B. & C. 602. (*l*) *Holford v. Hatch*, 1 Doug. 186. *Moule v. Garratt*, L. R., 5 Ex. 132; *Earl of Derby v. Taylor*, 1 East, ib. 7 Ex. 101; 39 L. J., Ex. 96; 41 L. 502. J., Ex. 62.

assignees, upon the same footing with respect to each other as that on which the lessor and the lessee and his assignees previously stood at common law, and gives them the same mutual remedies against one another as those previously existing between the lessor and the lessee and his assignees. The assignee of the reversion may consequently sue the lessee or his assignees upon the covenants entered into by the lessee with the lessor; (*m*) and he may himself be sued by the lessee or his assignees upon the covenants entered into by the lessor with the lessee. (*n*) But both the lease and the assignment must be under seal, or the benefit and the burden of the covenants will not run with the land. (*o*) The assignee may, however, if there is a lease by simple contract for a term not exceeding three years in duration, maintain an action for use and occupation against the lessee or his assignee. (*p*) And if a tenant holds on under an assignee of the reversion, and continues in the enjoyment of all the benefits secured to him by his original lease, he may be presumed to have agreed with the assignee to hold upon the same same terms as he held under the original lessor. (*q*)

The statute 32 Hen. 8, c. 34 extends to the assignee of a reversion expectant upon the determination of an incorporeal right, such as a right to dig for and carry away clay, granted for a term of years, (*r*) or a right to kill and take game; (*s*) also to the assignee

(*m*) *Brett v. Cumberland*, Cro. Jac. 522.

(*n*) *Palmer v. Edwards*, 1 Doug. 186. *Thursby v. Plant*, 1 Wms. Saund. 240. *Jourdain v. Wilson*, 4 B. & Ald. 266.

(*o*) *Beely v. Parry*, 3 Lev. 154.

(*p*) *Standen v. Christmas*, 10 Q. B.

142; 16 L. J., Q. B. 132. *Bickford v. Parson*, 5 C. B. 929; 17 L. J., C. P.

192.

(*q*) *Arden v. Sullivan*, 14 Q. B. 832; 19 L. J., Q. B. 269.

(*r*) *Martyn v. Williams*, 1 H. & N. 817; 26 L. J., Ex. 117.

(*s*) *Hooper v. Clark*, L. R., 2 Q. B. 200; 36 L. J., Q. B. 79.

of the reversion of copyhold tenements; (*t*) to the assignee of the reversion of a lease for life as well as for years; (*u*) to the assignee of part of the reversion in all the land; (*x*) and to the assignee of the reversion as to part of the land, though the assignee has not the whole interest in the covenant; (*y*) and, where tenant for life makes a lease in pursuance of a leasing power, the remainder-man is considered to be an assignee of the reversion within the statute. (*z*) But, to enable the assignee of the reversion to avail himself of the statute, it was held that there should be what was technically termed a privity of estate between him and the party he sought to charge with the performance of the covenants, *i. e.*, the assignee of the reversion and the party sought to be charged must have been respectively possessed of the estates which the covenantor and the covenantee had in the land at the time the covenants were entered into. If a lessee for a term of ninety-nine years created out of his estate an underlease for eleven years, leaving in himself the immediate reversion for the remainder of the term and obtained from the under-lessee covenants to pay rent and repair, and then assigned his immediate reversion for the term to A, who subsequently acquired the ultimate reversion in fee, wherein the reversion for the term became merged, it was held that A, after this merger, could not longer maintain an action upon the covenants, as the estate to which they were annexed, the reversion for the term immediately expectant upon the determination of the underlease, no longer

(*t*) *Glover v. Cope*, 3 Lev. 326; Carth. 205.

(*u*) *Lewes v. Ridge*, Cro. Eliz. 863. *Matures v. Westwood*, *ib.* 617.

(*x*) *Wright v. Burroughes*, 3 C. B. 685.

(*y*) *Twynam v. Pickard*, 2 B. & Ald. 105. Co. Litt. 215, a. *Badeley v. Vigurs*, 4 Ell. & Bl. 85.

(*z*) *Isherwood v. Oldknow*, 3 M. & S. 382, *Yellowly v. Gower*, 24 L. J. Ex. 29; 11 Exch. 274.

existed, and that, as the assignee was no longer in possession of the reversion which the covenantee had in the land, the privity of estate was gone and with it the right of action upon the covenants. (a) But by the 8 & 9 Vict., c. 106, repealing the 7 & 8 Vict., c. 76, it is enacted (s. 9) that, when the reversion expectant on a lease shall be surrendered or merged, the estate which shall for the time being confer, as against the tenant under the same lease, the next vested right to the same tenements, &c., shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease.

The assignee must also be the assignee of the legal estate in the land; and, whenever, it appears upon the face of the deed containing the covenants, that the lessor was clothed only with the equitable interest, the benefit and burden of the covenant do not pass to the assignee; (b) "for there is no estate in law to sustain and carry the covenant; and, if one having no estate at all in the land grants a lease to A, who assigns to B, with a covenant for quiet enjoyment, and B assigns over to C, no action lies for C against A, because nothing passed but by estoppel." (c) But, whenever an estate by estoppel becomes an estate in interest by the lessor's subsequent acquisition of the estate, the lessor and lessee, and their respective assignees, are clothed with the same rights and liabilities as if the estate had ab initio been an estate in interest. (d) And, "if a lease be made by indenture in such a form as to create between the lessor and lessee an

(a) *Webb v. Russell*, 3 T. R. 393.*Whitton v. Peacock*, 2 Sc. 630; 2(b) *Pargeter v. Harris*, 7 Q. B. 708*Bing. N. C.* 411.

15 L. J., Q. B. 113.

(d) *Walton v. Waterhouse*, 2 Wms.(c) *Noke v. Awdar*, Cro. Eliz. 436*Saund.* 418, n. e.

estoppel, to deny that the lessor had a reversion, and the lessor conveys all his interest, there seems to be no sound reason why the assignee should not establish his title by way of estoppel." (e)

434. *Assignees of grantees of a license* to take a profit from the soil of the grantor are as much bound by a covenant respecting the enjoyment of the license or making compensation for injury done to other land not included in the license, as a lessee and his assignees. (f)

435. *Requisites of the covenant*.—Whether the assignees are named or are not named in the covenant has been said to be wholly immaterial; (g) but the covenant must be "inherent in the land," that is, the performance or non-performance of it must affect the nature, quality, or value of the thing demised, and its mode of enjoyment, otherwise it does not run with the land. Thus, where the lessee, in a lease of land with liberty to make a water-course and erect a mill, covenanted, for himself and his assigns, not to hire persons to work in the mill who where settled in other parishes without a parish certificate, it was held that this covenant did not run with the land, as it did not immediately affect the nature of the

(e) 1 Smith's L. Cas. 77, 5th edit. *Webb v. Austin*, 8 Sc. N. R. 419. *Sturgeon v. Wingfield*, 15 M. & W. 228. *Rennie v. Robinson*, 7 Moore, 539.

(f) *Norval v. Pascoe*, 34 L. J., Ch. 84.

(g) *Minshull v. Oakes*, 2 H. & N. 809; 27 L. J., Ex. 194. This decision is contrary to the second rule in *Spencer's Case*, and seems to be very doubtful law (See the notes to *Spencer's Case*, 1 Smith's L. C. 57-60, 6th edit., where the *Case of Minshull v. Oakes* is commented upon). Thus it

seems that a covenant not to assign without license will not run with the land unless "assigns" are mentioned (*Williams v. Earle*, L. R., 3 Q. B. 739; 37 L. J., Q. B. 231. *West v. Dobb*, L. R., 4 Q. B. 637; 38 L. J., Q. B. 289, per Blackburn, J.). And in a case decided subsequently in equity, *Turner*, L. J., noticed that a covenant relating to something not in esse did not purport to bind the assigns, as though that would not be immaterial. *Wilson v. Hart*, L. R., 1 Ch. 463, 466; 35 L. J., Ch. 569, 572.

property demised whether the mills were worked by persons of one parish or of another, nor in any degree vary the nature of the property, or the value of it at the end of the term. (*h*) A covenant by the lessee of a house to account and pay so much for every tun of wine sold in the house is a collateral and mere personal covenant; (*i*) and so is a covenant by a lessee with his lessors, who are brewers, to take all his beer of such lessors or their successors in their trade; and such covenants go not with the land or the reversion by assignment. (*k*) So a proviso for re-entry in case of a conviction under the game laws does not entitle the reversioner to re-enter upon such conviction; (*l*) nor does a covenant not to build a public-house within half a mile of the demised premises run with the land. (*m*) But all covenants relating to the cultivation of the demised premises; (*n*) to pay rent, or render suits and services; (*o*) not to assign or underlet or otherwise part with the possession of the demised premises, without first obtaining the consent in writing of the lessor; (*p*) to dwell in and upon the demised farm and lands; (*q*) to insure premises situate within the weekly bills of mortality; (*r*) or not to exercise thereon certain specified trades; (*s*) have been held to run with the land; as also covenants to repair the buildings, and to repair, renew, and replace tenants' fixtures and machinery fixed to the

(*h*) Congleton v. Pattison, 10 East, 130.

(*i*) Godb. pl. 140. Canham v. Rust, 8 Taunt. 227; 2 Moore, 164.

(*k*) Bayley, J., Doe v. Reid, 10 B. & C. 857.

(*l*) Stevens v. Copp, L. R., 4 Ex. 20; 38 L. J., Ex. 31.

(*m*) Thomas v. Haywood, L. R., 4 Ex. 311; 38 L. J., Ex. 175.

(*n*) Cockson v. Cock, Cro. Jac. 125.

(*o*) Stevenson v. Lambard, 2 East, 575.

(*p*) Williams v. Earle, L. R., 3 Q. B. 739; 37 L. J., Q. B. 231.

(*q*) Tatem v. Chaplin, 2 H. Bl. 133.

(*r*) Vernon v. Smith, 5 B. & Ald. 1.

(*s*) Doe v. Keeling, 1 M. & S. 95.

premises; (*t*) to discharge the land from all taxes, burdens, &c.; (*u*) and to make good damage done by the exercise of a right granted for a term of years to dig for and carry away clay or minerals. (*x*) Where a lessee covenanted to grind at the lessor's mill all the corn that should grow on the demised lands, it was held that this was a covenant which ran with the land, and passed to the assignee of the reversion, as long as the ownership of the lands and the mill remained in the same individual. (*y*) And where a lessor demised a house, excepting two rooms and a free passage thereto, it was held that the exception amounted to an express covenant or grant of a free passage or right of way by the lessee, and would bind the assignees of the term. (*z*) If the lessee covenants not to erect buildings on the land demised so as to obstruct the lessor's light, or destroy his prospect, or impede the air, this is a covenant which runs with the land, and binds all the assignees of the term. (*a*) Where a vendor conveyed an estate to a purchaser to hold to him and his heirs to the use, intent, and purpose that certain specified trades should not be carried on upon the premises, it was held that there resulted from the stipulation an implied covenant not to carry on the specified trades in the house, which ran with the land, and bound all subsequent purchasers of the premises. (*b*) But a covenant by a purchaser of land, not naming his assigns, that no building erected on

(*t*) *Williams v. Earle*, L. R., 3 Q. B. 739; 37 L. J., Q. B. 231.

(*u*) *Dean, &c. of Windsor*, 5 Rep. 24, b. *Martyn v. Clue*, 18 Q. B. 681; 22 L. J., Q. B. 147.

(*x*) *Martyn v. Williams*, 1 H. & N. 828; 26 L. J., Ex. 122. *Norval v. Pascoe*, 34 L. J., Ch. 82.

(*y*) *Vyvyan v. Arthur*, 1 B. & C. 415.

(*z*) *Cole's Case*, 1 Sal. 196. *Bush v. Calis*, 1 Show. 389; *Carth.* 232.

(*a*) *Bachelor v. Gage*, Cro. Car. 188.

(*b*) *Hodgson v. Coppard*, 30 L. J. Ch. 20.

the land shall be used as a beer-shop, does not run with the land. (c)

If the lessee covenants to build a wall, or an out-house, or to erect a mill, or construct dwelling-houses, on some part of the demised land, then, although the covenant doth extend to a thing to be newly made, yet, as it is to be made upon the thing demised, the assignee shall take the benefit of it, if he be named. (d) But if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the covenants shall not extend to the assignee, "as if the lessee covenants, for himself and his assigns, to build a house upon land of the lessor which is no parcel of the demise"; (e) or to repair, renew, and replace mere utensils or movable chattels used in the business carried on in the demised premises, and being there at the time of the demise. (f)

436. *Parties entitled to sue.—Continuing breaches.*—Lastly, the covenant is transferred with the land by assignment, as appurtenant to the estate, but not an existing breach of such covenant. (g) Thus, where rent covenanted to be paid was in arrear, and an action was brought, to which the defendant pleaded that, after the arrearages incurred, and before action brought, the plaintiff had assigned his reversion, it was held, on demurrer, that the right to the arrearages was "a right vested in the plaintiff before the assignment,

(c) Turner, L. J., *Wilson v. Hart*, L. R., 1 Ch. 463; 35 L. J., Ch. 569.

(d) *Smith v. Arnold*, 3 Salk. 4. Anon., Moore. 159. pl. 300. *Sampson v. Easterby*, 9 B. & C. 505. *Easterby v. Sampson*, 6 Bing. 645; 4 M. & P. 601.

(e) *Spencer's Case*, 5 Co. 16, a.; 1

Smith's Lead. Cas., 6th ed., pp. 57-60. *Doughty v. Bowman*, 11 Q. B. 454, qualified and explained; *Minshall v. Oakes*, 2 H. & N. 809; 27 L. J., Ex. 194.

(f) *Williams v. Earle*, L. R., 3 Q. B. 739; 37 L. J., Q. B. 231.

(g) *Lewes v. Ridge*, Cro. Elis. 863.

the which he should not lose by the assignment"; (*h*) for, although the covenant had been been transferred with the estate to the assignee, yet it was not so with respect to the right of action which had previously accrued. But as regards what are termed continuing breaches, the assignee may maintain an action as soon as he becomes seized or possessed of the estate to which the covenant running with the land is annexed; as in the case of a breach of a covenant to repair, where, although the covenant has been broken, and the premises are left out of repair, at the time of the assignment, and, in that condition, come into the hands of the assignee, yet, if they remain so afterwards, during the continuance of the term, the covenant is then broken again in the time of the assignee, there being a constant repetition of the breach, as long as the acts to be done upon the land remain unperformed. (*i*) But, if the covenant be broken, and the lease expires, and then the premises are assigned, the assignee can maintain no action upon the covenant; for, the lease being at an end, there is an end of the covenant, which had been broken once for all, so that the ultimate damage had accrued before the time of the assignee. A breach of a covenant for title is in the nature of a continuing breach, as long as the party entitled to the benefit of the covenant is in possession of the land under a defective title; for, although if one doth covenant that "he is lawfully seized in fee, or that he hath a good estate, and hath not, the covenant is broken as soon as it is made," yet, as long as the assignee does not enjoy the land under a good title, "there is a continuing breach; for it is not like a covenant to do an

(*h*) *Anon.*, *Skin.* 367. *Midgley v.* (*i*) *Mascal's Case*, 1 *Leon.* 62. *Vivian Lovelace*, *Carth.* 289; 12 *Mod.* *v. Campion*, 1 *Salk.* 141; 2 *Id.* *Raym.* 46. 1125.

act of solitary performance, which not being done, the covenant is broken once for all, but is in the nature of a covenant to do a thing toties quoties, as the exigency of the case may require." (*k*)¹

437. *Implied covenants* arising from the word "demise" in a lease under seal run with the estate or term of years created in the land, so that the assignee of the lessee, if evicted, has an action thereon against the original lessor. But the law raises no implied covenant from a person who has not the legal estate in the land, as from a mortgagor who has joined a mortgagee in making a lease, (*l*) and from whom no legal interest passes. By the 8 & 9 Vict. c. 106, s. 4, it is enacted, that the word "give" or "grant," in a deed executed after the 1st of Oct., 1845, shall not imply any covenant in law; but from the word "demise" there is still an absolute covenant for quiet enjoyment.²

438. *Covenants annexed to the estates of joint tenants and tenants in common.*—If the assignees have a joint in-

(*k*) Shep. Touch. 170.

Noke's Case, 4 Co. 80, b. Smith v

(*l*) Spencer's Case, 5 Co. 16, a. Pocklington, 1 C. & J., 445.

¹ Crisfield v. Swor, 36 Md. 129; Taylor v. Holter, 1 Mon. T. 688. Farnham v. Hotchkiss, 2 Abb. (N. Y.) App. Dec. 93; Phoenix Ins. Co. v. Continental Ins. Co. 14 Abb. (N. Y.) Pr. N. S. 266; Carroll v. Charter Oak Ins. Co. 1 Abb. (N. Y.) App. Dec. 316; French v. New, 2 Id. 209; Helmert v. Christian, 27 Wis. 104; Langsdale v. Nicklaus, 38 Ind. 289; Scobey v. Fenton, 39 Id. 275; Twitchell v. Doury, 25 Mich. 393; Purcell v. Hannibal, &c. R. R. Co. 50 Mo. 504; Eaton v. Lyman, 30 Id. 41; Lamb v. Burbank, 1 Sawyer, 227; Vance v. Pena, 41 Cal. 686; Lents v. Legnard, 70 Pa. St. 192; Nichols v. Alexander, 28 Wis. 118.

² The New York Revised Statutes have not abrogated the common-law doctrine of implied covenants, as applied to leases for years; and a lease for years implies, on the part of the lessor, a covenant for quiet enjoyment, and on the part of the lessee, a covenant to pay rent. Lyman v. Onondaga Salt Co. 64 Barb. 558.

terest in, and are jointly entitled to, the estate to which the covenants are annexed, they have a joint interest in the covenants; and separate interests when they have several estates, and a separate and distinct damage will accrue to each from a breach of the covenants. Joint tenants have a joint interest in respect of their joint estate; but tenants in common have, it seems, when a reversion expectant upon the determination of a lease for years upon which a rent has been reserved, comes to them, a joint or separate interest in the rent, at their election. (m) But, in covenants running with the land, and coming to parties either as tenants in common or joint tenants, the interest is joint or several, according as a joint duty arises in favor of all, or separate duties to each. (n) If, therefore, the entire reversion is divided among several persons, each possessing a distinct interest in his particular portion, and a breach of covenant takes place affecting the value of the entire reversion, each of the parties interested has a separate right of action; and the damages will be assessed and apportioned according to their several shares and interests in the subject-matter of the covenant. The benefit of a covenant to repair in a joint-demise by tenants-in-common runs with the entire reversion only; and therefore, the representatives of all the tenants-in-common, on a lease so jointly made by them, have a joint interest in the damages arising from a breach of such covenant. (o)

439. *Assignment of rents and annuities.*—The grant of a sum of money to issue out of the land of the grantor, and to be paid at fixed consecutive periods, for a term of years, for life, or in fee, is in strictness of

- (m) *Martin v. Crompe*, 1 Ld. Raym. 170; 13 C. B. 479. *Simpson v. Clayton*, 4 Bing. N. C. 758.
 341. *Harrison v. Barnby*, 5 T. R. 246.
 (n) *Kitchen v. Buckley*, 1 Lev. 109. (o) *Thompson v. Hakewell*, 19 C. B., N. S. 713; 35 L. J., C. P. 18.
Magnay v. Edwards, 22 L. J., C. P.

law a rent. When it is granted to be paid by the grantor and his representatives only, then it is an annuity. As, however, both the land and the personalty are generally made liable to the payment of the money, the term "annuity" has been indiscriminately used to signify both the charge on the person and the charge on the land, which, as the rights and properties by law incident to the one and the other are altogether different, is apt to create some confusion and misconception concerning them. (*p*) A rent or sum of money, issuing out of land, is a direct interest in realty in possession, and was assignable by the common law; but an annuity or sum of money granted to be paid by the grantor and his representatives only, issuing therefore out of personalty, or, as it has been termed, "the coffers of the grantor," and not charged upon or issuing out of the land, was a mere personal contract or chose in action, and could not, therefore, be assigned so as to give the assignee a right of action for it in his own name. (*q*) When both the person and the land of the grantor were made liable to the payment of the money, the grantee had an election, either to bring a writ of annuity, and charging the person to make the grant personal only, or by distraining on the land to make it real: but he could not have both the one and the other; for, the writ of annuity having been once brought, the land was thenceforth discharged. So long, however, as the election had not been made, the rent passed with all its legal rights and incidents to the assignee, who, standing in the shoes of the grantee, had the same right of election as between the land and the person, and

(*p*) Doct. & Stud. Dial. 1, c. Case, 7 Co. 28, b. Gerrard v. Boden, 30. Heil. 80. Faker v. Brook, 1 Dy.

(*q*) Co. Litt. 144, a; 144, b. Maund's 65, a.

might, by suing out a writ of annuity, release the land and turn the charge entirely on the person of the grantor. (r) As, however, no personal action other than the writ of annuity could be maintained in respect of a rent granted for life or in fee, so long as the estate of freehold had continuance (s), there being remedies of a higher and more summary nature by way of distress and assize, no right of action could be transferred to the assignee of a freehold rent; but when the rent was granted for a term of years, then, as an action of debt might be maintained for the recovery of such rent, such right of action would pass to the assignee as incident to the interest in the land granted. (t)

Rent reserved on a lease for years might, at common law, be severed from the reversion, and assigned so as to give the assignee an action of debt for the arrears. (u) Where premises were demised for a term of years by an indenture of lease containing covenants by the lessee for the payment of rent, and subsequently the rent, and the counterpart of the lease, and the benefit of the covenants, were assigned, it was held that the assignee might maintain debt against the lessee for the recovery of the rent. (x) But, although the remedy by action of debt for the recovery of the specific sum payable out of the land passed to the assignee as incident to the direct interest in the land assigned, yet nothing in the shape of contract passed by the assignment, and the assignee had no remedy upon any contract or stipulation made con-

(r) *Bac. Abr. Rent* (K), 2. *Co. Litt.* 144, b.

(s) *Webb v. Jiggs*, 4 *M. & S.* 113. *Randall v. Rigby*, 4 *M. & W.* 130.

(t) *Browne v. Pendlebury*, *Cro. Eliz.* 268. *Gilbert's Rents*, 93.

(u) *Newcomb v. Harvey*, *Carth.*

161. *Wilston v. Pilkney*, 2 *Lev.* 80; *Ventr.* 242. *Cartright v. Pilkney*, *Ventr.* 272. *Ards v. Watkin*, *Cro. Eliz.* 637.

(x) *Allen v. Bryan*, 5 *B. & C.* 512. *Williams v. Hayward*, 28 *L. J.*, *Q. R.* 374; 1 *El. & El.* 1040.

cerning the land, or for better securing the payment of the rent, and could maintain no action of covenant; for a covenant cannot run with a rent. Thus, where the defendant covenanted with Barnsley to pay him, his heirs and assigns, a certain rent, to be issuing out of the land of the defendant, and covenanted to build one or more messuages on the land for better securing the payment of the rent, it was held that this covenant was a mere personal covenant, operative only between the immediate parties thereto and their privies, and that the assignee of the rent had no title to maintain an action upon the covenant, either for the non-payment of the rent, or for not building the messuages. (y)

(y) *Milnes v. Branch*, 5 M. & S. Raym. 318. *Spencer's Case*, 1 Smith's 411. *Brewster v. Kitchen*, 1 Ld. L. C. 74, 5th ed. in notis.

SECTION III.

TRANSFER BY DEATH.

440. *Rights of heirs upon real and personal covenants and simple contracts entered into with their ancestors.*—Real contracts, or covenants running with the land, annexed to an estate of inheritance, descend with the land, in case of death, to the heir-at-law, not only without his being named in the covenant, but also where the covenant is made with the covenantee and his executors. (z) The heir-at-law also represents his ancestor upon such personal covenants as relate to the freehold, and affect the value of the inheritance.¹ Thus, if a man covenants with another and his heirs to enfeoff him and his heirs of the manor of D, and will not do it, and he to whom the covenant is made die, his heir will have a right of action upon the deed. (a)² If three co-partners purchase land in fee, and mutually covenant, each with the other of them and their heirs, that the survivors shall convey to the heirs

(s) *Lougher v. Williams*, 2 Lev. 92. (a) *Fitz N. B.* 145, c. Touch. 175.

¹ See, in Arkansas, *Campbell v. Ware*, 27 Ark. 65; in Wisconsin, *Perkins v. Simonds*, 28 Wis. 90; in New York, *Wheeler v. Clutterbuck*, 52 N. Y. 67; and, generally, *Willey v. Haley*, 60 Me. 176; *Dubold v. Field*, 8 R. I. 266; *Mathers v. Scott*, 37 Ind. 303; *Matter of Silvey*, 42 Cal. 210; *Murphy v. Henry*, 35 Ind. 442; *Houston v. Davidson*, 45 Ga. 574; *Austin v. Wight*, 38 Conn. 405; *Benson v. Swan*, 60 Me. 160; *Botsford v. O'Connor*, 57 Ill. 72; *McKenney v. Mellon*, 3 Houst. 277; *Reynolds v. Brandon*, 3 Heisk. 593.

² The construction of a devise, like that of a contract, is always for the court, and never for a jury. *Brusk v. Tucker*, 42 Cal. 346.

of such as shall die first, the heir of a deceased covenantee may maintain an action upon the covenant. (b) the principle established being that, if the heir-at-law would have had the benefit of whatever would have accrued from the performance of the covenant, he shall have the damages that accrue from the non-performance. So where a contract for the purchase of land is entered into between an intestate and another person, and it has not been completed at the intestate's death, but is capable of being enforced, the money and the land are to go as if the contract had been actually carried into execution, and the heir-at-law is entitled to have either the land or the money which would have been applied in the purchase of the land under the intestate's contract. (c) So, where a person contracted with a builder to erect a house on a piece of freehold land belonging to him, and died intestate before the house was finished it was held that the heir-at-law was entitled to have the house finished at the expense of the personal estate. (d)

441. *Of the heir's right of action in respect of continuing breaches of real covenants.*—When a real contract or covenant, running with the land, has been broken in the lifetime of the ancestor, and the breach remains a continuing breach in the time of the heir-at-law, the latter is the only party who can maintain an action in respect thereof, if no actual damage has resulted to the personal estate. (e) Where the plaintiff, as executrix, declared that the defendant, by deed conveying to her testator certain lands, covenanted with the testator that he was seized in fee, and had a right to convey,

(b) *Wotton v. Cook*, Dy. 337, b.(c) *Hudson v. Cook*, L. R., 13 Eq.
417. 41 L. J., Ch. 306.(d) *Cooper v. Jarman*, L. R., 3 Eq.
98; 36 L. J., Ch. 85.(e) *Vivian v. Campion*, 2 Ld. Raym
1125.

&c., and assigned for breach that the defendant was not seized in fee, and had not a right to convey, &c., it was held that the executrix could not maintain an action for such breaches, without showing some special damage to the testator in his lifetime, as any damage that accrued after his decease would be a matter which concerned the heir. (*f*) And, where a vendor of land executed a conveyance, professing to convey an estate in fee in the land, and covenanted with the vendee and his heirs for further assurance on request, and a request was made by the vendee in his lifetime to have a fine levied by the vendor for better assuring the estate granted, but no fine was levied, in consequence whereof the heir-at-law of the vendee, after the death of the latter, who quietly enjoyed the estate during his life, was evicted, and brought his action for the damages consequent thereon, it was held that, as the ultimate damage had been sustained by the heir-at-law, he was the proper party to maintain the action. (*g*)

Where, however, the ancestor was himself evicted, it was held that, the eviction being to the ancestor, he could not have an heir or assignee of that land, and so the damages belonged to the executors, though not named in the covenant, and nothing descended to the heir. (*h*) So, where, by the breach of a covenant for title, the estate of the ancestor has been actually divested, the personal representative is the only party who can maintain an action upon the covenant. (*i*)

442. *Right of action of the personal representatives.*—With respect to breaches of real contracts not in the nature of continuing breaches, where the cov-

(*f*) *Kingdon v. Nottle*, 1 M. & S. 355.

(*h*) *Lucy v. Levington*, 2 Lev. 26; 1 Ventr. 175.

(*g*) *Jones v. King*, 4 M. & S. 188.

(*i*) *Kingdon v. Nottle*, 1 M. & S. 363.

enant having been broken is broken once for all, and the entire and ultimate damage has accrued, such damage, if it results in the time of the ancestor, survives to his personal representative. (*k*) Such must have been the case, where the plaintiff brought an action as executor of the Bishop of Winchester, and alleged in his declaration that Brian, the predecessor of the bishop, his testator, had demised a rectory and certain lands to S for twenty-one years, who had assigned the lease to the defendants, and that the lessee covenanted with Brian and his successors to repair the chancel of the church, the barns, &c., and assigned as a breach the not repairing thereof in the life of the bishop, the plaintiff's testator, and averred that the lease afterwards expired, when it was held that the executor was entitled to maintain the action. If the lease, in this case, expired in the lifetime of the bishop, the plaintiff's testator, the covenant ceased, no further breach of it could be committed, the ultimate damage was then sustained, and, that damage having accrued in the lifetime of the testator, it would be properly sued for by his executor. (*l*) If the lease had not then expired, the executor could not have maintained the action, except in respect of some actual damage resulting from the breach to the personal estate of his testator, inasmuch as there would be a continuing breach as long as the covenant remained in force and unfulfilled, and the succeeding bishop to the testator would consequently, on becoming seized of the reversion, be entitled to sue the lessee upon his covenants, and to recover as much damages as would suffice to put the premises into repair; and, if the executor could sue upon the covenant, as well as the heir or

(*k*) *Ricketts v. Weaver*, 12 M. & W. 718. (*l*) *Morley v. Polhill*, 2 Ventz. 56.

the successor, except in respect of some special damage to the personal estate of the testator, the lessee would be harassed with two actions for the breach of one and the same duty, which the law will not suffer.

If a man covenants not to cut down certain trees growing on the land of the covenantee, and afterwards fells them in the lifetime of the latter, the personal representative is the proper party to maintain an action for the breach, as the entire damage has accrued, and the covenant has been broken, "once for all," before the time of the heir-at-law. There can be no continuing breach of such a covenant; and the right of action, therefore, remains with the personal representative as part of the personal estate. (m) And if a man enters into a covenant with the testator to discharge the testator's land from incumbrances, the executor is the proper party to maintain an action to recover damages for whatever breaches are committed in the lifetime of the testator, such breaches constituting separate and distinct causes of action, and operating as a direct injury to the personal estate. (n) So, with regard to the breach of a covenant to pay rent, although the covenant when annexed to an estate of inheritance descends with the land to the heir-at-law, yet all the arrearages that have accrued up to the death of the ancestor are only to be sued for by the personal representative. In these cases each breach is entire, giving a separate and distinct right of action; and, although the covenant is transferred with the estate, yet it is not so with the breaches and consequent right of action that have previously accrued. (o)

443. *Transfer of covenants annexed to estates pur autre vie.*—If an estate is holden during the life of

(m) *Raymond v. Fitch*, 2 C. M. & R. 519.

(n) *Smith v. Simonds*, Comb. 64.

(o) *Midgley v. Lovelace*, Carth. 289.

another, and the grantee or assignee of such estate dies in the lifetime of the cestui que vie, the estate will pass to the heir-at-law or the personal representatives of the grantee *pur autre vie*, according as he or they may or may not be named in the deed or instrument of conveyance. If the estate *per autre vie* is limited to the grantee or lessee and his heirs, the heir will take as special occupant on the death of the grantee, living cestui que vie, because he is included by name in the grant. If, on the other hand, the estate is limited to the grantee and his executors, the personal representative will take; for, although it is a freehold, which by the common law would not go to executors, yet they may be designated by name, so as to take as special occupants. (*p*) And now, if the estate is granted or assigned to the party generally, without words of limitation, the personal representative will take the estate by force of the statute, (*q*) and be entitled to the benefit of the performance of all covenants annexed thereto. If the owner of an estate *pur autre vie* which has been granted to him, his heirs and assigns, bequeaths the estate to A and his assigns, and A dies intestate in the lifetime of the cestui que vie, the premises will pass to A's personal representative under the statute, and not to his heir-at-law. (*r*)

444. *Transfer of covenants annexed to leasehold estates and interests.*—All real contracts or covenants running with the land, annexed to reversions for terms of years, leases and chattel interests in land, pass together with the estates to which they are annexed, to the personal representatives of the deceased cove-

(*p*) *Doe v. Robinson*, 8 B. & C. 296. *Bac. Abr. Estates for life and occupancy*, B. 3. *Carpenter v. Duns- more*, 3 Ell. & Bl. 918.

(*q*) 29 Car. 2, c. 3, s. 12. 1 Vict. c. 26, s. 6.

(*r*) *Doe v. Lewis*, 9 M. & W. 662.

nantee. (s) No mere words of limitation can vary the course of succession of a chattel interest. If a lease for years is made to a man and his heirs, or a term of years is limited to him and the heirs of his body, or the heirs male of his body, it will go to his executors. (t) So, if a lease for years is granted to a bishop, parson, or other sole corporation, and his successors, it passes, on the death of the lessee, to his personal representatives, and not to his successors; succession in a body politic being as inheritance in the case of a body private. (u) No estate of freehold can be created out of a term of years. If, therefore, a lessee for years makes a lease for life, it is a chattel interest. (x) If a person holds lands as tenant by statute merchant, statute staple, or elegit, he also has a chattel interest only, which passes to his personal representative. (y) Whatever covenants, therefore, are annexed to such estates and interest in the land pass to the personal representative as the assignee in law of the covenantee; and he alone can maintain an action upon them.

445. *The executor or administrator is alone entitled to sue upon all bonds and personal covenants and simple contracts entered into with the testator or intestate, and to recover debts of record due to him, such as judgments, statutes, or recognizances, or debts due on specialties. (z) And so completely does the executor or administrator represent the testator or intestate, in respect of his personal contracts, that, if a*

(s) Co. Litt. 46, b.; 388, a.

(x) Butt's Case, 7 Co. 23, a.

(t) Leonard Lovie's Case, 10 Co. 87, b. Leventhorpe v. Ashbre, 1 Roll. Abr. 611.

(y) Co. Litt. 42, a. 2 Saund. 68. 2 Inst. 396.

(u) Fulwood's Case, 4 Co. 65, a. Howley v. Knight, 14 Q. B. 240; 19 L. J., Q. B. 3.

(z) Com. Dig. Administration (B. 13). Vin. Abr. Executors.

bond or other personal obligation under seal is made to a man and his heirs, the executor or administrator is the only party who can maintain an action upon the instrument. (a) But if a bond is conditioned to pay money to such person as the testator shall by will appoint, and the testator makes no appointment, the representative has no claim to the money, as he is not the appointee contemplated by the bond. (b) The right of action upon all simple or parol contracts entered into with the testator or intestate, whether they be or be not made concerning land, is transferred to the executor or administrator; (c) and so also is the right of action upon all bills of exchange and promissory notes and negotiable securities payable to the testator or intestate. (d) He is entitled to indorse and negotiate all notes payable to the order of the testator; and if the testator has indorsed such a note in his lifetime for a valuable consideration, but has neglected to deliver it to the indorsee, the latter is entitled to call upon the personal representative for an indorsement of the note. (e)

446. *The personal representative is entitled to the benefit of all such of the executory contracts of the deceased as he can fairly and efficiently fulfill; and, therefore, if a man builds half a house, or makes half a wheel-barrow, or half a pair of shoes, and dies, the executors may complete and deliver them, and sue either for work and labor done by them, or for goods sold delivered by them as executors. (f) When,*

(a) *Devon v. Paulett*, 11 Vin. Abr. 133, pl. 27.

(b) *Pease v. Mead*, Hob. 9.

(c) *Orme v. Broughton*, 10 Bing. 533; 4 M. & Sc. 417. *Knights v. Quarles*, 4 Moore, 532. *Bishop v. Curtis*, 13 Q. B. 878.

(d) *Timmis v. Platt*, 2 M. & W. 720. *Murray v. E. I. Co.*, 5 B. & A. 216.

(e) *Watkins v. Maule*, 2 Jac. & Walk. 243.

(f) *Werner v. Humphreys*, 3 Sc. N. R. 226. *Marshall v. Broadhurst*, 1

however the contract is founded upon the known skill of the deceased, or his peculiar talents and intellectual capabilities and acquirements, it is determined by his death. If a publisher, for example, agrees to pay some celebrated poet or author a fixed sum of money for a poem or treatise, and the writer dies before he has completed his task, the contract is absolutely determined, and the publisher is not bound to pay any part of the stipulated remuneration, unless he has accepted and used some portion of the work, in which case he will be liable upon the ordinary implied promise in respect of a benefit actually received. But where an engineer was appointed to construct certain works, which it was calculated would occupy fifteen months, and was to be paid for his services during that period the sum of £500, by equal quarterly instalments, and shortly after the end of the third quarter he died, two of the quarterly instalments then remaining unpaid, it was held that, although his death put an end to the contract for the future, it did not divest the right of action for those instalments which had already accrued to him, and that his administrator was therefore entitled to recover them, and not merely to sue upon a quantum meruit for the value of the amount of the work actually done. (g) Contracts of apprenticeship, founded upon personal instruction on the one side and the render of work and service on the other, have been held to be discharged and put an end to by the death of either party; (h) but most contracts of apprenticeship are regulated by statute, or by the custom of trade in particular districts; and the executors, in some places, are bound to assign the apprentice to another master. If the master has cove-

Cr. & J. 405. *Collinson v. Lister*, 20 Beav. 365.

(g) *Stubbs v. Holywell Ry. Co. L. R.*, 2 Ex. 311; 36 L. J., Ex. 166.

(h) *Baxter v. Burfield*, 2 Str. 1266.

nanted, in the usual way, to find the apprentice in meat, drink, and other necessities during the term of apprenticeship, the death of the master is no discharge of this covenant, but the personal representatives are bound to perform it, so far as they have assets. (i)

447. *Liability of the heir-at-law and devisees.*—The heir-at-law was liable, at common law, to an action for a breach of a covenant annexed to a reversionary estate which had descended to the heir. (k) The heir-at-law was also liable, in common with the personal representative, to the extent of the assets which had come to him by descent, upon all contracts under seal entered into by the ancestor in which he was expressly named, but not otherwise. (l) If there was a devisee of the real estates of a debtor (not being a devisee for payment of debts, or in pursuance of an ante-nuptial marriage contract), such devisee was not liable at common law, but might, by the 1 Will. 4, c. 47, be sued jointly with the heir upon all contracts under seal made by the ancestor and deviser in which the heirs were named, and whereby the ancestor or deviser became indebted, in his lifetime, to the covenantee or obligee. If there was a devisee¹ and no

(i) *Wadsworth v. Guy*, 1 Sid. 216.
R. v. Peck, 1 Salk. 65. *Walker v.*
Hull, 1 Lev. 177.

(l) *Dyke v. Sweeting*, Willes, 585.
 Bac. Abr. HEIR (F). Co. Litt. 209, a.
 And see the notes to *Jefferson v. Morton*, 2 Wms. Saund. 7 b.

(k) *Derisley v. Custance*, 4 T. R. 75.

¹ As to devisees, who may be and what they may take, see *Matter of Fox*, 52 N. Y. 530; *Hall v. Hall*, 47 Ala. 290; *Bruck v. Tucker*, 42 Cal. 346; *Green v. Sutton*, 50 Mo. 186; *Bowers v. Bowers*, 4 Heisk. 293; *O'Hara v. Dever*, 3 Abb. (N. Y.) App. Dec. 407; *Henderson v. Green*, 34 Iowa, 437; *Spooner v. Lovejoy*, 108 Mass. 539; *Slack v. Bird*, 23 N. J. Eq. 238; *Bailey v. Southwick*, 6 Lans. 356; *Seibert v. Wise*, 70 Pa. St. 147; *Greenawalt v. Greenawalt*, Id. 485; *Taylor v. Taylor*, 9 R. I. 119; *Whitford v. Armstrong*, Id. 394; *Penyear v. Edmondson*, 4 Heisk. 43; *Prindle v. Beveridge*, 4 Lans. 225; *Lincoln v. Lincoln*, 107 Mass. 590; *Cummings v. Slaw*, 108

heir, then the action lay against the devisee only. If the heir had sold or conveyed away the lands that had descended to him before the commencement of the action, he was, nevertheless, responsible to the extent of the full value of such lands; (*m*) and, if assets by descents vested in the heir, the charge continued to run against his heir taking the same assets. (*n*) The heir was not, at common law, responsible upon any simple contract entered into by the ancestor, whether he was or was not named therein, or whether he had or had not assets by descent; but the legislature has by various statutes made all the real estate of every debtor assets for the payment of every kind of debt. (*o*) By the 17 & 18 Vict. c. 113, s. 1, it is enacted that, where a mortgagor of land dies without providing by his will for the satisfaction and discharge of the mortgage debt out of his personal estate, the heir or devisee to whom the mortgaged land descends, or to whom it has been devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of the mortgagor, but the mortgaged land shall, as between the different persons claiming through the deceased mortgagor, be primarily liable to the payment of the mortgage debt with which the same shall be charged. And by the 30 & 31 Vict. c. 69, s. 1, it is provided

(*m*) 11 Geo. 4 & 1 Wm. 4, c. 47, ss. 3, 4, 6. *Farley v. Briant*, 3 Ad. & E. 846. (*o*) *Fleming v. Buchanan*, 22 L. J., Ch. 886. *Hamer, ex parte*, 21 L. J., Ch. 832. 3 & 4 Will. 4, c. 104. 32 & 33 Vict. c. 46.

(*n*) *Anon.*, *Dyer*, 368, a, pl. 46.

Id. 159; *Borden v. Downey*, 35 N. J. L. 78; *Batchelor v. Macon*, 69 N. C. 544; *Geyer v. Wentzel*, 68 Pa. St. 84; *Ogden's Appeal*, 70 Id. 501; *Crisfield v. Storr*, 36 Md. 129; *Green v. Sutton*, 50 Mo. 186; *Burleigh v. Clough*, 52 N. H. 267; *Yarnall's Appeal*, 70 Pa. St. 335; *Tyson v. Tyson*, 38 Md. 567; *Scott v. Scott*, 70 Pa. St. 244; *Kimball v. Story*, 108 Mass. 382; *Daboll v. Field*, 9 R. I. 266.

that in construing the will of any person dying after the 31st of December, 1867, a general direction for the payment of debts out of the personalty is not to include mortgage debts, unless a contrary intention is expressed or necessarily implied. And by s. 2, the word "mortgage" in that Act and the 17 & 18 Vict. c. 113, is to extend to any lien for unpaid purchase-money.

448. *Liabilities of executors and administrators on covenants for the payment of rent.*—The personal representative of a deceased lessee or termor is, in contemplation of law, the assignee of the term, and is liable, as such, upon all covenants running with the land annexed to leases and chattel interests, (*p*) to the extent of the assets in his hands, although he does not enter upon, or take possession of, the demised premises. (*q*) If he enters and takes possession, he then becomes *prima facie* chargeable de bonis propriis, for the full amount of the rent; but if the annual value of the property is less than the rent, he is then personally responsible only to the extent of the actual annual value; but he continues liable, in his representative character, to the extent of the assets in his hands, for the proportion of the rent which exceeds the annual profits, or what the land is worth to let. (*r*) If the rent is of less value than the lands, which the law *prima facie* supposes, so much of the profits as suffices to make up the rent is appropriated to the lessor, and cannot be applied to anything else; and no other payment out of the profits can be justified till the rent is answered. On the other hand if the rent is more than the land is worth, the profits must be appropri-

(*p*) *Spencer's Case*, 5 Co. 17, b. 241; 1 N. & M. 185. *Wollaston v. Ante*, p. 615. *Hakewell*, 4 Sc. N. R. 614. *Hep-*

(*q*) *Howse v. Webster*, *Yelv.* 103. *wood v. Whaley*, 6 C. B. 744; 16 L

(*r*) *Rubery v. Stevens*, 4 B. & Ad. J., C. P. 43.

ated to its discharge as far as they will go. (s) The personal representatives cannot rely on any deterioration in value which has resulted from non-performance of covenants which ought to have been fulfilled by them. (t)

449. *Covenants to repair.*—If the executor has entered and taken possession of leasehold premises, he will become personally responsible de bonis propriis to the extent of the entire damage resulting from the breach of a covenant to repair, whether the profits derived from the premises are or are not adequate to meet the costs of repairing. (u)

450. *After an assignment of the term,* whether made by the lessee in his lifetime, or by the executor after his decease, the executor cannot be charged upon the covenants of the lease as assignee of the estate; but he still remains liable upon the privity of contract (ante, p. 315). (x) If he has himself assigned the lease, he is chargeable as assignee, in respect of breaches of covenants that accrued during the time the term was vested in him, but not for breaches committed afterwards. The executor of the lessee always remains liable, in his representative character, to the extent of the assets in his hands, and may be sued as executor upon the covenants contained in the lease, notwithstanding the assignment of the term; and if the lessor has assigned his reversion, the action may be brought against him by the assignee of the reversion; "for, by the express words of the 32 Hen. 8, c. 34, such remedy as the lessor might have had against the lessee or his executors, such remedy the assignee

(s) *Buckley v. Pirk*, 1 Salk. 316; 1 Nms. Saund. 112, n. (c). *Jevens v. Harridge*, 1 Saund. 1, n. (1).

(t) *Hornidge v. Wilson*, 11 Ad. & E. 655.

(u) *Tremeere v. Morrison*, 4 M. & Sc. 613. *Sleep v. Newman*, 12 C. B., N. S. 116.

(x) *Helier v. Casebert*, 1 Lev. 127. *Coghil v. Freelove*, 3 Mod. 320.

of the lessor shall have against them." (y) Hence the executor of a lessee, who has contracted to sell the lease, is entitled to require, and ought to obtain, from the purchaser, an indemnity against the payment of of rent and performance of covenants. (z) But the personal representative of an assignee of the lease is exonerated from all liability after an assignment of the term. The assignee may, as we have already seen, get rid of his liability upon the covenants by simply assigning his estate; and the same power of release is naturally possessed by his personal representative. (a) The executor of an assignee of a lease, who has covenanted to indemnify the assignor for breaches of the covenants of the lease, is not bound to retain the proceeds of a sale of the lease to form a fund for indemnification in respect of some possible future breach of the covenant by his testator. (b)

451. *Liabilities of executors upon personal contracts.*—The personal representatives are responsible to the extent of the assets that come to their hands, upon all the contracts of their testator or intestate, whether they are deeds or contracts by record or simple contracts, and whether the "executors or administrators" are named in the contract, or whether they are not, and whether the breach has been incurred in the lifetime of the testator or intestate, or after his decease. They are liable even where the heir is named, and the executors are not named, in the contract. They are liable to pay calls and subscriptions upon covenants and subscription contracts made by their testator, so long, at all events, as they are in pos-

(y) *Brett v. Cumberland*, Cro. Jac. 523.

(z) *Staines v. Morris*, 1 Ves. & B. 8.

(a) *Rowley v. Adams*, 4 Myl. & Cr. 542.

(b) *Collins v. Crouch*, 13 Q. B. 547. And see further, as to the liability of executors and administrators upon covenants contained in leases, the 22 & 23 Vict. c. 35, s. 27, *infra*.

session of the shares held by the testator; (c) but they are not bound to reserve funds for the payment of calls that may or may not be made.

452. *Administration of assets.*—The 22 & 23 Vict., c. 35, s. 27, which is retrospective in its operation, (d) contains provisions limiting the liability of executors and administrators upon covenants or agreements contained in any lease or agreement for a lease after an assignment thereof, and for a distribution of assets after setting aside a certain fund to answer claims on such covenants. Formerly, the assets must have been applied first in satisfaction of the judgment-creditors of the testator or intestate, and then in payment of debts due from him on contracts of record and contracts under seal, and debts due for rent, whether reserved by deed or by simple contract, and, lastly in satisfaction and discharge of simple contract debts. (e) But now, by the 32 & 33 Vict., c. 46, it is provided that in the administration of the estate of every person who shall die on or after the first day of January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding; provided always that this act shall not prejudice or affect any lien, charge, or other security which any

(c) *Wills v. Murray*, 4 Exch. 863.
Birk, Lane, &c. v. Cotesworth, 5 Id.
 226. *Heward v. Wheatley*, 22 L. J.,
 Ch. 435.

(d) *Dodson v. Sammell*, 1 Drew &
 Sm. 575; 30 L. J., Ch. 799.

(e) *Williams, EXECUTORS*, 848-894.
Vincent v. Godson, 21 L. J., Ch. 122

creditor may hold or be entitled to for the payment of his debt. If the liability upon a covenant is contingent, and may or may not come into existence, the executor cannot reserve funds to meet the probable liability, but must pay the specialty or simple contract debts which have actually accrued. (*f*) When lands have been mortgaged by the deceased, the mortgaged property is, as we have seen, primarily liable to the payment of the mortgage debt charged thereon. When a will contains a direction to the executor to pay the testator's debts, and then a devise of real estate to that executor, the real estate so devised is charged with the debts. (*g*) If the executor pays a debt of a lower degree before one of a higher, he must, on a deficiency of assets, answer the superior debt out of his own estate, if he had notice of the existence of the last-named debt at the time he made the payment; but if he had no notice of its existence, he can not then be charged *de bonis propriis*; for it is the creditor's own fault not to have made a prompt application to the executor for payment. (*h*) It must be observed, however, that the personal representative has notice of all judgment debts recovered against himself, and will pay debts of inferior degree at his own peril; (*i*) but, as regards judgment debts recovered against the testator or intestate, and of which he may have had no notice, these must be docketed or registered pursuant to the statutes in that behalf, (*k*) before he can be

(*f*) *Henderson v. Gilchrist*, 22 L. J., Ch. 970.

(*g*) *Harris v. Watkins*, 23 L. J., Ch. 541. *Wrigley v. Sykes*, 25 L. J., Ch. 458.

(*h*) *Harman v. Harman*, 2 Show, 478. *Bac. Abr. Executors. L. 2.* 22 & 23 Vict. c. 35, s. 29. *Rock v. Leighton*, 1 Salk. 310. *Britton v. Bathurst*, 3 Lev. 114; 1 Saund. 333, a.

n. Davies v. Monkhouse, Fitzgib. 76. *Sawyer v. Mercer*; 1 T. R. 690.

(*i*) *Littleton v. Hibbins*, Cro. Eliz. 793.

(*k*) 23 & 24 Vict. c. 38. 1 & 2 Vict. c. 110. 2 & 3 Vict. c. 11. 27 & 28 Vict. c. 112. *Williams, Executors*, 886. *Gaunt v. Taylor*, 3 Sc. N. R. 700. *Jennings v. Rigby*, 33 L. J., Ch. 149.

made liable for a devastavit in paying simple contract debts before them. If not registered, they rank only as debts by simple contract, and can claim no priority.

(*l*) Where the executors of a shareholder in a company, which was a going concern at the time of the testator's death, paid a legacy under his will without leaving assets to meet any liability in respect of shares which they retained unsold, they were held liable as contributories to pay the amount of the legacy in satisfaction of calls. (*m*)

The executor has a right to pay creditors of equal degree in any order he may think fit, and to sell or mortgage the assets for that purpose, (*n*) unless one of such creditors has obtained judgment for his debt.

(*o*) He has a right to retain for his own debt in preference to all other debts of equal degree; and he may, after actions are commenced against him by a creditor on simple contract, confess a judgment in favor of another creditor of equal degree, and thus give the latter a preference. (*p*) Process need not have been issued by the creditor to whom the judgment is confessed; but the judgment must be confessed to a bona fide creditor, and must be confined to the debt really due to him. (*q*) If two actions have been brought against the executor by two several creditors standing in the same degree, and the executor has pleaded *plene administravit præter* a certain sum to one action, he may plead in bar to the action by the other creditor *plene administravit præter* the same

(*l*) *Turner, in re*, 33 L. J., Ch. 232.

(*m*) *Taylor v. Taylor*, L. R., 10 Eq. 477; 39 L. J., Ch. 676.

(*n*) *Earl Vane v. Rigden*, L. R., 5, Ch. 663; 29 L. J., Ch. 797.

(*o*) See the 32 & 33 Vict. c. 46, *ante*. p. 636.

(*p*) *Lyttleton v. Cross*, 3 B. & C.

322. *Cockroft v. Black*, 2 P. Wms.

298. *Wynch v. Grant*, 24 L. J., Ch. 6; 2 Drew. 312.

(*q*) *Tolputt v. Wells*, 1 M. & S. 404.

sum, and as to that sum that he has confessed it in another action; and the plaintiff in the second action can then only obtain judgment of assets quando acciderint. (r) The executor of a deceased incumbent is by custom bound to satisfy and discharge all the debts, both specialty and simple contract debts, of the deceased, before he satisfies claims for dilapidations. (s) It would seem, however, that the effect of the 34 & 35 Vict. c. 43, s. 36, which makes the claim for dilapidations as ascertained by that act a debt due from the late incumbent, his executors or administrators, to the new incumbent, has been to place claims for dilapidations on an equal footing with simple contract debts, a position which they seem to have previously held in the administration of equitable assets by the court of chancery. (t)

453. Liability of personal representatives on executory contracts of the deceased.—If a purchaser who has ordered goods dies before the time of delivery, his executor or administrator must receive them and pay for them, or make good the damage sustained by his refusal to accept, to the extent of the assets in his hands. (u) If a testator has agreed to build a house by such a day, or to pay a certain sum as liquidated damages for the default, his executor is bound either to build the house or to pay the money. (x) But contracts for personal services and contracts founded exclusively on the personal skill and intellectual capacity of the parties die with them, and do not

(r) *Waters v. Ogden*, 2 Doug. 455. *Cooper v. Jurman* L. R., 3 Eq. 98, 100; 36 L. J., Ch. 85.

(s) *Bryan v. Clay*, 1 Ell. & Bl. 38; 22 L. J., Q. B. 23. (x) 15 H. 7; f. 13. *Quick v. Ludbarrow*, 3 Bulstr. 30. *Parke. B.*, 1 M. & W. 423. *Marshall v. Broadhurst*, 1 Cr. & J. 405. *Collinson v. Lister*, 28

1221. (t) *Burgess v. Bissett*, 2 Jur. N. S. 1221. (u) *Wentworth v. Cock*, 10 Ad. & Beav. 365.

give rise to any liability on the part of their personal representatives—such as contracts by authors to write a book for a publisher, contracts by physicians to cure a patient of a particular disease, contracts by teachers and masters to instruct their pupils or apprentices, promises of marriage, &c. (*y*) These contracts are strictly personal to the deceased, and the executors cannot be called on to perform them. A contract made by a firm consisting of two partners, for the employment of an agent in their business for a term of years, was held to be discharged by the death of one of the partners before the expiration of the term, that appearing to have been the intention of the parties. (*z*) And where A was hired by P, to serve as farm-bailiff at weekly wages, with other advantages, the service to be determinable by a six months' notice, or payment of six months' wages, and P died during the service, it was held that P's personal representative was not bound to continue A in her service, or to pay him six months' wages. (*a*) So, where an intestate had authorized the plaintiff to sell a picture of the intestate, and promised him £100 for his trouble in case he succeeded in selling it, but before any sale had been effected the intestate died, and after his death the plaintiff sold the picture and claimed the £100, it was held that the authority to sell was revoked by the death of the intestate, and that his administrator was not bound to pay the £100. (*b*) But the death of the surety does not operate as a revocation of a continuing guarantee. (*c*)

(*y*) *Baxter v. Burfield*, 2 Str. 1266.
Chamberlain v. Williamson, 2 M. &
 S. 408. *Taylor v. Caldwell*, 3 B. &
 S. 836; 32 L. J., Q. B. 164.

(*z*) *Tasker v. Shepherd*, 6 H. & N.
 575; 37 L. J., Ex. 207.

(*a*) *Farrow v. Wilson*, L. R., 4 C.
 P. 744; 38 L. J., C. P. 326.

(*b*) *Campanari v. Woodburn*, 24 L.
 J., C. P. 15.

(*c*) *Bradbury v. Morgan*, 31 L. J.,
 Ex. 462; 1 H. & C. 249.

454. *Joint liability of executors and administrators.*—If there are several executors or administrators, they are jointly liable in case they have all proved the will or administered. (*d*) And when one of several executors, to whom probate has been granted, is an infant, he is liable in his representative character, and may be sued jointly with the adult executors upon the contracts of the testator. (*e*)

455. *Executor de son tort.*—If one, who is neither executor nor administrator, intermeddles with the goods of the deceased in this country, and does acts appertaining to the office of an executor, he makes himself what is called in law an executor de son tort, or an executor of his own wrong, and becomes clothed with all the liabilities that appertain to the office of an executor, and may be sued as executor by the creditors of the deceased, although there is a lawful executor; (*f*)¹ but a person does not make himself an executor de son tort by taking possession of property of a deceased person situate abroad. (*g*) There are many acts, however, which a stranger may do without incurring the hazard of being considered executor de son tort, such as giving directions for the funeral of the deceased, making an inventory of his effects, providing necessaries for his children, and the performance of such deeds of charity and kindness as are due from one neighbor or friend to another. The intermeddling must be an uncalled-for and officious intermeddling with the estate of the deceased. The nature of the acts and the degree of interference which

(*d*) Com. Dig. Administration, B. 12; Pleader, 2 D. 6; Abatement, F. 10. *Swallow v. Emberson*, 1 Lev. 161.

(*e*) *Frescobaldi v. Kinaston*, 2 Str. 784.

(*f*) *Read's case*, 5 Co. 33, b.

(*g*) *Beavan v. Ld. Hastings*, 2 Kay & J. 727.

¹ See, in Wisconsin, *Jones v. Billstein*, 28 Wis. 221.

will constitute a party executor of his own wrong are questions of law for the court ; but it is a question of fact whether the acts creating the liability have been done by the party sought to be charged. (*h*) The executor de son tort and the lawful executor may be joined as defendants in the same action, or they may be sued separately ; but a wrongful executor and rightful administrator cannot be made joint defendants. (*i*) The executor de son tort may be made responsible upon the contracts of the deceased to the extent of the assets which have come to his hands, but no further. (*k*)

A person who takes property under an executor de son tort, does not himself become an executor de son tort by so doing. (*l*) Where a lessee died intestate during the term, and his widow entered and paid rent, and afterwards the defendant, her son-in-law, took the premises with the assent of the landlord, and paid rent, and continued to occupy during the remainder of the term, it was held that, there being no assignment in writing, he could not be considered an assignee ; for, though the widow might have been chargeable as executrix de son tort, the defendant had not made himself executor de son tort by taking the premises after her. (*m*) The executor of an executor de son tort is not liable for a breach of contract by the testator. (*n*)

456. *Feme covert executrix.*—A married woman may be appointed executrix ; and if her husband allows her to act, she is clothed with all the powers of a feme sole. Payment to her of a debt due to her testator is

(*h*) *Padget v. Priest*, 2 T. R. 97.

(*i*) *Com. Dig. Administrator*, C. 3. 1 W. Saund. 264, c. n. (2).

(*k*) *Dyer*, 166, b. 1 Saund. 265.

(*l*) *Hill v. Curtis*, L. R., 1 Eq. 90 35 L. J., Ch. 133.

(*m*) *Paull v. Simpson*, 15 L. J., Q. B. 382.

(*n*) *Wilson v. Hodson*, L. R. 7 Ex. 84 ; 41 L. J., Ex. 49.

a valid payment, though her husband refuses to allow her to act, and prevents a probate of the will from being granted to her. (o) The law gives to the husband of a feme covert executrix or administratrix the right of administration; and therefore he may bring a joint action in the names of himself and his wife in respect of all personal contracts entered into with the testator, and to recover possession of debts and all other choses in action which accrued to the deceased in his lifetime; and which are consequently vested in the wife in her representative character, as in the case of choses in action vested in the wife in her own right; (p) but he will be liable for a devastavit, unless the money is properly administered. (q) If a debt due to the wife as executrix is paid to a third party without any authority from the husband, the debt still remains due to the wife in her representative character; and if the husband dies, the wife may bring an action for it; but if the money has been received by the authority of the husband, the action may be brought in his name alone. (r) A feme covert executrix may, notwithstanding her coverture, by will appoint her executor, so as to continue the chain of representation. (s)

457. *Death of personal representatives.*—*Continuation of the chain of representation.*—On the death of one of several executors, either before or after probate, the entire right of representation survives to the others. When the surviving executor, or when a sole executor, dies after probate, his executor, and the executor of such executor, is in law the executor of the first testator, and as such is entitled to all contracts entered into

(o) *Pemberton v. Chapman*, Ell. Bl. 616. *Yard v. Ellard*, 1 Ld. Raym. 368; 1 Salk. 117.

(p) *Tirrell v. Bennett*, 1 Sid. (r) *Anon.*, 1 Salk. 282.

299. (s) *Scammell v. Wilkinson*, 2 East

(q) *Ankerstein v. Clarke*, 4 T. R. 551. *Barr v. Carter*, 2 Cox, 429.

with the latter. If, therefore, one of two executors makes his will, appoints his executor, and dies, and then the other dies intestate, the executor of him who died first cannot be executor to the first testator, but administration of the goods of the first testator with the will annexed must be taken out. But when the sole or surviving executor dies before probate of the will has been granted, his executor cannot be made executor to the first testator, inasmuch as he cannot prove the will of the testator, and is consequently incapable of recovering his debts. (*t*) Administration of the goods and chattels of the first testator with the will annexed, therefore, must be taken out. An administrator *durante minore ætate* of the executor of an executor is the representative of the first testator; for such an administrator stands *loco executoris*. (*u*) If one of several executors alone proves the will, the rest renouncing before the ordinary, the right of representation is not, in case of the death of him who has proved, transmitted to his executors, but survives to the co-executors, who may, notwithstanding their renunciation, forthwith take upon themselves the execution of the will; (*x*) but if they all still refuse, then administration *de bonis non*, with the will annexed, must be obtained. The renunciation of one executor in the lifetime of another is a nullity; but it is otherwise, if it is made after he has become the sole surviving executor. (*y*)

458. *Administration de bonis non*.—On the death of an administrator, or of a sole or surviving executor after probate intestate, no interest or right of representation is transmitted to his administrator; but admin-

(*t*) Wankford v. Wankford, 1 Salk. 308.

(*u*) Anon., 1 Freem. 288, pl. 335.

(*x*) House v. Lord Petre, 1 Salk. 311.

(*y*) Arnold v. Blencove, 1 Cox, 226.

istration de bonis non must be taken out. (z) By the grant of such administration, the administrator de bonis non becomes the only personal representative of the original deceased, and is clothed with all the legal rights which belonged to the former executor or administrator in his representative character. (a) It was held, however, in an old case, that where an administrator received part of a debt, being rent in arrear due to the intestate, and took a promissory note payable to himself personally for the residue, this was such an alteration of the property as vested it in the administrator himself, and therefore that, on his death, his own personal representative, and not the administrator de bonis non, was entitled to the note. (b) Consistently with the more recent decisions, however, it could now hardly be held that the taking of such a note by a man in his character of administrator, as a further security for a debt due to the estate of the intestate, would be an absolute conversion of the debt to his own use, so as to render him liable for a devastavit;¹ and, if not, the note so received would still be assets in his hands, he might sue in his representative capacity upon it, and it would consequently go to the administrator de bonis non, as the personal representative of the original intestate, and not to his own executor or administrator. (c) If, however, the administrator should take a bond or other obligation under seal, payable to himself personally, this would be an absolute conversion to his own use of the property, and his own personal representative, and not the administrator de bonis non,

(z) *Tingrey v. Brown*, 1 B. & P. 310. *Suwerkrop v. Day*, 8 Ad. & E. 624. *Elliott v. Kemp*, 7 M. & W. 624.

311. *Moseley v. Rendell*, L. R., 6 Q. B. 338; 40 L. J., Q. B. 111. (b) *Barker v. Talcot*, 1 Vern. 474.

(c) *Catherwood v. Chaband*, 1 B. &

(a) *Hirst v. Smith*, 7 T. R. 182. C. 150.

¹ And see *Bowers v. Grimes*, 40 Ga. 616.

would be entitled to the legal interest in the new security. (*d*) Where an administrator, being possessed of a term for ninety-nine years in his representative capacity, made an under-lease, reserving rent to himself individually, which the under-lessee covenanted to pay to him, his executors, &c., it was held that the executor of the administrator, and not the administrator *de bonis non*, was the proper party to maintain an action upon the covenant. (*e*) When administration has been granted to two persons, and one dies, the survivor will be sole administrator; (*f*) and as the administrator has no interest or right of representation but what he derives from the act of the ordinary, he can in no case continue the trust reposed in him to his own executor.

459. *Survivorship of liability.*—On the death of one of several executors or administrators, the survivors become liable upon all contracts made by the testator or intestate in his lifetime; and, on the death of the surviving executor, the personal representative of such survivor. (*g*) If the surviving executor dies intestate, the administrator *de bonis non* of the original testator, is the party liable; and so he is also on the death of the administrator of the original testator.

460. *Appointment of a debtor as executor.*—It was a doctrine of the common law that, if a creditor made his debtor his executor, the right of action for the debt was discharged; but this was really only an objection to the form of the action; for the debt was assets, and the executor was answerable for the amount; (*h*) and in equity he was regarded as a

(*d*) Norden *v.* Levit, 189.

(*e*) Drew *v.* Bayly, 3 Keb. 298, 427, 549, 795; 2 Lev. 100.

(*f*) Adams *v.* Buckland, 2 Vern. 514.

(*g*) Com. Dig. Abatement, F. 10.

(*h*) Wankford *v.* Wankford, 1 Salk. 306. Brown *v.* Selwyn, Cas. Temp. Talbot, 241; 3 Bro. P. C. 607. Rawlinson *v.* Shaw, 3 T. R. 559. Flud &

trustee of the debt for the parties interested in the estate. (*i*)

461. *Appointment of a debtor as administrator.*—

If a person dies intestate, and administration is granted to a debtor of the deceased, the debt is not thereby extinguished; for he comes into the administration by the act of the law, whereas the other is the act of the party. (*j*) He is, moreover, clothed with a mere authority; and his interest is less than that of an executor. Therefore, if the obligor of a bond takes out administration to the obligee, and dies, the administrator de bonis non of the obligee may maintain an action against the executor of the obligor for the recovery of the debt. (*k*)

462. *Appointment of a creditor as executor.*—If a debtor makes his creditor his executor, the action for the debt is not released, unless the latter thinks fit to act, and to take upon himself the burden of the administration of the estate; (*l*) and if he does act, the right of action for his debt is not discharged, unless he has legal assets in his hands sufficient to satisfy the debt, in which case he may pay himself out of such assets, (*m*) without reference to the statute of limitations. (*n*) If one of two joint and several debtors makes their common creditor his executor, and dies, and the executor has no assets of the deceased wherewith to satisfy the debt due to him, he may sue the surviving debtor; but not if he has assets out of

Rumcey, Yelv. 160; 1 Rolle's Abr. 920, pl. 12, 13. Phillips v. Phillips, 2 Freem. 11; 1 Ch. C. 292. Simmons v. Gutteridge, 13 Ves. 262. Carey v. Gooding, 3 Bro. Ch. C. 110.

(*i*) Spence's Eq. Jur., vol. 2, p. 296.

(*j*) Bac. Abr. EXECUTORS, A. 10.

(*k*) Hudson v. Hudson, 1 Atk. 461.

Lockier v. Smith, 1 Sid. 79; 1 Keb. 313, pl. 33.

(*l*) Rawlinson v. Shaw, 3 T. R. 559.

(*m*) Lowe v. Peskett, 16 C. B. 511; 24 L. J., C. P. 196. Powys, J., Wankford v. Wankford, 1 Salk. 304. Holt, C. J., Id. 305. Ashby v. Child, 1 Rolle Abr. 940.

(*n*) Hill v. Walker, 32 Law T. R. 71

which he may retain the debt; for the having assets amounts to payment. (*o*) So, if the debtor appoints his creditor to be one of several executors, and there are no assets, or the creditor executor neither proves the will nor acts, he is not prevented from suing his co-executor; (*p*) and if he dies, his executor can maintain an action for the debt against the surviving executor. A creditor executor is in all cases entitled to retain the amount of his debt out of the assets that come to his hands to be administered; also a debt due from the testator to the wife of such executor before her marriage. (*q*)

463. Civil death.—Where a person has been outlawed, he is civilly dead, and is incapable of enforcing any contract he may have entered into, (*r*) although he is liable to be sued thereon. (*s*) If he is outlawed for a capital offense, he forfeits all his lands and tenements; and in all cases, after outlawry, he forfeits his goods and chattels, debts and choses in action. All his bonds, bills, notes and covenants, and securities for the payment of money, vest in the crown; and the king or his grantee may maintain an action upon them in his own name. (*t*) The forfeiture extends also to all property in which he is beneficially interested, and to all equitable as well as legal rights. Therefore, a bond taken in another's name, or a lease granted to another in trust for him, becomes forfeited to the crown. (*u*) The removal of the disability by reversal

(*o*) *Cock v. Cross*, 2 Lev. 73. Anon., 1 Freem. 49.

(*p*) *Dorchester v. Webb*, W. Jones, 345.

(*q*) *Woodward v. Lord D'Arcy*, Plowd. 185, a. *Boyd v. Brooks*, 34 Beav. 7; 34 L. J., Ch. 605.

(*r*) Hawk. P. C. lib. 2, c. 49, s. 9.

(*s*) *Macdonald v. Ramsey*, Foster, 61; Sid. 60; Cro. Jac. 426.

(*t*) Com. Dig. Forfeiture, B. 2. Slade's Case, 4 Co. 95, a. *Ford's Case*, 12 Co. 2. *Bullock v. Dodds*, 2 B. & Ald. 276. *Roberts v. Walker*, 1 Russ. & M. 753.

(*u*) Hawk. P. C. lib. 2, c. 49, s. 10 *Earl of Somerset's Case*, Hob. 214.

of the outlawry, does not enable the party thus restored to his civil rights to sue upon any of the bonds, covenants, or personal contracts which have been forfeited and have become vested in the crown. But inasmuch as his freehold land is not divested out of him and transferred to the crown until office found, (x) he has a right to sue the lessees and tenants of such property upon covenants for the payment of rent, covenants to repair, and other real contracts connected with such estates, unless the crown interferes to prevent him. He may also grant leases thereof, and deal generally with the property subject to the paramount title of the crown. (y)

The outlaw may, however, sue in autre droit, as, for instance, in his character of executor; and a mayor and commonalty may sue, although the mayor himself has been outlawed. (z)

464. *Felons.*—The law was formerly the same with respect to felons; but a considerable change has been effected by the 33 & 34 Vict. c. 23, by which forfeiture or escheat for felony, with its consequences, is abolished. But the choses in action to which a convict, that is a person against whom, after the passing of that act, judgment of death or of penal servitude has been pronounced, was, at the time of his conviction, or may thereafter, until he has suffered his punishment or received a pardon, become entitled, pass to the administrator or interim curator appointed under that act, who may cause payment or satisfaction to be made out of the convict's property of any debt or liability of the convict. (a)

465. *Survivorship of joint contractors.*—At com-

(x) *Doe v. Evans*, 5 B. & C. 587.

(z) Co. Litt. 128, a.

(y) *Doe v. Pritchard*, 5 B. & Ad.

(a) 33 & 34 Vict. c. 23, ss. 14,

765. *Clerke v. Scroggs*, 2 Lutw. 1513. 24.

mon law, when several persons took a joint interest in, and had a joint right of action upon, a contract, and one of them died, the action must have been brought in the name of the survivors; and the personal representative of the deceased could not be joined; (b) nor could he sue separately. (c) If a bond was made to three persons to pay a sum of money to one of them, who afterwards died, the two survivors were the only parties who could maintain an action upon the instrument, although they had no interest in the sum mentioned in the condition. (d) If a sum of money was invested in the funds in the joint names of two persons, the survivor took the whole at law, although he might be accountable in equity as a trustee of the money. (e) If two persons advanced a sum of money by way of mortgage, and took the mortgage to them jointly, and one died, the whole interest and right of action at law went to the survivor; but in equity, the representative of him who was dead had his proportion. (f) It followed, therefore, that, if all the parties jointly interested in a contract died, the right of action vested in the personal representative of the one who survived the others, and that the executors or administrators of those who died previously could not be joined. And although, for the furtherance of trade and commerce, the doctrine of survivorship was excluded among merchants, so as to permit the interest in joint contracts of a commercial character to pass, in case of death, to the personal representative, and to enable him to maintain an action of account against the survivors for the share of the deceased, yet the remedy by way of action upon

(b) *Hellingham v. Clark*, 1 B. & S. 332.

(d) *Rolls v. Yate*, Yelv. 177.

(c) *Anderson v. Martindale*, 1 East,

(e) *Crossfield v. Such*, 8 Exch. 825;

(f) *Bradburne v. Botfield*, 14 M. &

22 L. J., Ex. 325.

W. 572

(f) *Petty v. Steward*, 1 Ch. Rep. 31.

the contract always survived. Thus, if two partners in trade appointed a factor, and one died, the personal representative of the deceased could not join in an action against the factor upon the partnership account. (*g*) When, on the other hand, the parties to a contract took several and distinct interests, the action was properly brought in the name of the personal representatives of the deceased.¹

In the case of joint contracts, the estate of a deceased partner was made liable in equity to the creditors of the firm, although the liability at common law survived to the surviving partners; and the personal representative of a deceased joint contractor will, therefore, now be liable to the extent of the assets that have come to his hands. If several persons jointly contract for the building of a ship, or the furnishing a house, for the common benefit of all, for a certain sum, and it is expressly agreed that, if any of the parties should die before the completion of the work, his executors should stand in his place, there, though the legal remedy of the party employed would have been solely against the survivors, yet the law

(*g*) *Martin v. Crompe*, 1 Ld. Raym. 340.

¹ *Halliburton v. Sumner*, 27 Ark. 460; *Favill v. Roberts*, 50 N. Y. 223; *Chase v. Whiting*, 33 Wis. 544; *Adams v. Harris*, 47 Miss. 44; *Purser v. Short*, 58 Ill. 477; *Chapman v. Hollister*, 42 Cal. 462; *Blodgett v. Hilt*, 29 Wis. 169; *Overdeer v. Upogurth*, 69 Pa. St. 110; *Succession of Cordevoille*, 24 La. Ann. 317; *McGowan v. McGowan*, 48 Miss. 553; *Potter v. Smith*, 36 Ind. 231; *Anderson v. Green*, 46 Ga. 361; *Smith v. Drake*, 23 N. J. Eq. 302; *Prindle v. Beveridge*, 7 Lans. (N. Y.) 225; *Jones v. Billstein*, 28 Wis. 221; *Brown's Appeal*, 68 Pa. St. 53; *Tutt v. Zenir*, 51 Me. 425; *Seibert v. True*, 8 Kan. 52; *Haynes v. Harris*, 33 Iowa, 516; *Stearns v. Wright*, 51 N. H. 600; *Farley v. McConnell*, 7 Lans. (N. Y.) 428; *Horn v. Woolfolk*, 45 Ga. 546; *Leach v. Prebster*, 35 Ind. 415; *Wilsons v. Davis*, 37 Id. 141; *Wilbourn v. Wilbourn*, 48 Miss. 38; *Phillips v. Green*, 4 Heisk. (Tenn.) 350;

would certainly imply a contract, on the part of the deceased, that his executors should pay their proportion of the contract price. (*h*)

(*h*) *Prior v. Hembrow*, 8 M. & W. 889.

McGregor v. McGregor, 3 Abb. (N. Y.) App. Dec. 92; *Ewing v. Ewing*, 38 Ind. 390; *Rogers v. Dively*, 51 Mo. 193; *Killebrew v. Murphy*, 3 Heisk. (Tenn.) 546; *Hendlee v. Cloud*, 51 Mo. 301; *Pettingill v. Pettingill*, 60 Me. 411; *Brown v. Ventress*, 24 La. Ann. 187; *Williams v. Tobias*, 37 Ind. 345; *Clopton v. Booker*, 27 Ark. 482; *Rapp v. Matthias*, 35 Ind. 332; *Middlebrook v. Merchants' Bank of New York*, 3 Abb. (N. Y.) App. Dec. 295; *Moore v. Shields*, 68 N. C. 327; *Whaley v. Whaley*, 51 Mo. 36; *McVey v. McVey*, Id. 406; *Campan v. Campan*, 25 Mich. 127; *Adams v. Larrimore*, 51 Mo. 130; *Carrhart v. Montana Mineral Land, &c. Co.* 1 Mon. T. 245; *Chew v. Evans*, 8 Phil. (Pa.) 103; *Hampton v. Nicholson*, 23 N. J. Eq. 423; *Wright v. Grovier*, 25 Mich. 428; *Hook v. Payne*, 14 Wall. 252; *Wood v. Myrick*, 17 Minn. 408; *Norris' Appeal*, 71 Pa. St. 106; *Sirrine v. Southwestern Ry.* 47 Ga. 487; *Robinson v. Glancy*, 69 Pa. St. 89; *Reynard v. Peyton*, 24 La. Ann. 342; *Field v. Gamble*, 47 Ala. 443; *Cross v. Brown*, 51 N. H. 486; *Hall's Heirs v. Hall*, 17 Ala. 290; *Flack v. Dawson*, 69 N. C. 42; *Green v. Allen*, 45 Ga. 205; *Norwood v. Hollimon*, 27 Ark. 445; *Cherry v. Hardin*, 4 Heisk. (Tenn.) 199; *Moises v. Sprague*, 9 R. I. 541; *Behrens v. Leucht*, 2 Cin. (Ohio) 217; *Brewster v. Brewster*, 52 N. H. 52; *Thompson v. Branch*, 35 Tex. 21; *Dunnell v. Municipal Court of Providence*, 9 R. I. 189; *Stanley v. Mason*, 9 N. C. I.; *Russell v. Almphet*, 27 Ark. 339; *Sanford v. McGreedy*, 28 Wis. 103; *Wilson v. Barclay*, 22 Gratt. (Va.) 534; *Staggs v. Furgerson*, 4 Heisk. (Tenn.) 690; *Elrod v. Alexander*, Id. 352. *Latham v. Blackmore*, Id. 276; *Brown v. Lewis*, 9 R. I. 497; *Bouslough v. Bouslough*, 68 Pa. St. 498; *Davis v. Fox*, 69 N. C. 435; *Parrish v. Brooks*, 4 Brews. (Pa.) 154; *Cool v. Higgins*, 23 N. J. Eq. 308; *Evans v. Evans*, Id. 71; *Forest v. Androscoggin Co.* 32 N. H. 477; *Stone v. Bancroft*, 108 Mass. 98; *Smith v. Dodds*, 35 Ind. 452; *Burnham v. Lasselle*, Id. 425; *Neal v. Pulten*, 47 Ga. 73; *Dunlap v. Newman*, 47 Ala. 428; *Beall v. New Mexico*, 16 Wall. 535; *Smith v. Brittan*, 45 How. (N. Y.) Pr. 428; *Farnham v. Mallory*, 2 Abb. (N. Y.) App. Dec. 100; *Vaughn v. Stephenson*, 69 N. C. 212; *Willand's Appeal*, 70 Pa. St. 410; *Estate of Brown*, 8 Phil. (Pa.) 197; *Cochrane v. Martin*, 47 Ala. 525; *Downing v. Marshall*, 1 Abb. (N. Y.) App. Dec. 525; *Matter of Saltus*, 3 Id. 243.

SECTION IV.

TRANSFER BY MARRIAGE.

466. *Rights of the husband upon the wife's contracts before marriage at common law.*—At common law, the husband by the marriage acquires a qualified property in the wife's choses in action; but it is a qualified property only; for, until he has reduced them into his possession, they remain the property of the wife; and if the husband omits to reduce them into his possession in his lifetime, they survive to the wife, who is alone entitled to the benefit of them. (i) The husband and wife have therefore a joint interest in them.¹

But as the husband has the power of immediately enforcing a claim of the wife, forbearance by him from so doing is a sufficient consideration to support a promise made to him alone; (k) and upon such a promise the husband alone must sue, as the wife is no party nor privy to it. (l)¹

If the husband has commenced a joint action in his own name and in that of his wife, for the purpose of reducing the wife's chose in action into possession, and the wife dies before judgment, the husband's right is gone, and the unrecovered chose in action vests in the personal representative of the wife; but if the wife dies after judgment, but before execution

(i) *Milner v. Milnes*, 3 T. R. 631. (k) *Rumsey v. George*, 1 M. & S. 865. *Sherrington v. Yates*, 12 M. & W. 180.

(l) *Lea v. Minnie*, Yelv. 84.

¹ See *ante*, pp. 258–271 (§§ 168–175), and notes thereto.

the husband alone is entitled to the benefit of the judgment, and may have execution thereon. (m) If the husband receives money which was owing to the wife, or if he, or he and his wife, authorize a person to receive it, who actually obtains it, either of such modes of receipt will change the wife's interest in the property, and will be a reduction of the chose in action into the possession of the husband, divested of her title to it upon surviving him ; (n) but, when money owing to the wife is received by a person as agent for the husband and wife to carry into effect certain specified objects, he cannot, against the will of the parties, treat this as a reduction into possession by the husband on his own account and for his own purposes. (o)¹

The husband is alone entitled during the coverture to the benefit of covenants running with the wife's land, and may sue alone even after the wife's death for all breaches not in the nature of continuing breaches, where the ultimate damage has accrued during the coverture, or he may sue jointly with the wife in her lifetime. Where, however, the breach of a covenant running with the land is a continuous one, and may continue after the death of the husband, as in the case of breaches of covenant for title and further assurance of the wife's lands, the wife will be entitled to such damages as may result from the continuing breach of the contract after the coverture is at an end, and therefore both should join in suing. (p)² The

(m) *Cecchi v. Powell*, 6 B. & C. 253 ; 9 D. & R. 243. *Gabriel Miles' Case*, 1 Mod. 179.

(n) 1 Rolle Abr., D. 350. Co. Litt. 351, a. *Temple v. Temple*, Cro. Eliz. 791.

(o) *Jones v. Cuthbertson*, L. R., 7 Q.B. 218.

(p) *Alebury v. Walby*, 1 Str. 229. *Dunstan v. Burwell*, 1 Wils. 224. Bro. Abr. Covenant, p. 110. *Brett v. Cumberland*, 3 Bulst. 163 ; Cro. Jac. 399.

See *ante*, pp. 258-271 (§§ 168-175), and notes thereto.
Id.

husband is also entitled to the benefit of all bills of exchange and promissory notes payable to the wife not indorsed by her before marriage. (*q*) In the exercise of his marital rights also, he may at once indorse them, the wife's power of indorsement over them being superseded by the marriage, and vested in the husband. (*r*) If the husband does not reduce choses in action of this nature into his possession in his lifetime, they survive to the wife. The receipt by the husband of interest on a promissory note made to the wife before the marriage, is no evidence of a reduction of the note into the possession of the husband during the coverture. (*s*)¹

467. *Rights of the husband upon the wife's contracts by statute.*—The married women's property act, 1870, (*t*) has very much modified the common-law right of the husband to his wife's property, and in a less degree, his right to her choses in action. By s. 2 of that act, deposits in savings banks made by, and annuities granted by the commissioners for the reduction of the national debt to, women who afterwards marry, remain the separate property of such women, and are to be accounted for and paid to them as if they were unmarried women. And a woman, married after the passing of that act, will be solely entitled to the benefit of covenants running with any freehold, copyhold, or customary land which may descend to her as heiress of an intestate. (*u*)²

(*q*) *McNeillage v. Holloway*, 1 B. & Ald. 221. The observation of Lord Ellenborough in that case "that a promissory note may be treated as a personal chattel in possession," is incorrect. See per Parke, B., *Yates v. Madeley*, 6 M. & W. 427.

(*r*) *Mason v. Morgan*, 2 Ad. & E. 30. *Connor v. Martin*, cited 3 Wils. 5.

(*s*) *Hart v. Stephens*, 6 Q. B. 937.

(*t*) 33 & 34 Vict. c. 93.

(*u*) Sect. 8.

¹ See *ante*, pp. 258-271 (§§ 168-175), and notes thereto.

² *Id.*

468. *Liability of the husband upon the wife's contracts made before coverture.*—At common law, if a feme sole executes a bond, or makes a promissory note, or accepts a bill of exchange, and then marries the husband and wife are jointly liable; (x) and, if judgment is recovered against them both in the wife's lifetime, execution may be issued against the husband, who may thus be compelled to fulfill his wife's contract made before marriage, or to discharge and satisfy the wife's debt. (y) But if these debts are not recovered against the husband and wife in the lifetime of the wife, the husband cannot be charged with them. And if the wife dies during the pendency of the action, and before a joint judgment has been obtained against them both, the husband is discharged, (z)¹ but if she dies after judgment, the husband remains liable. If no action is brought during the coverture, and the wife survives, she remains as liable for the debt as she was before the marriage, (a) but if an action was brought and judgment recovered against husband and wife during the coverture, and if the husband became bankrupt, and obtained his discharge, the liability of both was gone at law, (b) although her property settled to her separate use at the time of the marriage remained liable in equity. (c)²

This liability of the husband has been affected by

(x) *Drue v. Thorne*, Aleyn, 72.
Mitchenson v. Hewson, 7 T. R. 348.
Hayward v. Williams, Sty. 280. *Haydon v. Miller*, 2 Rolle, 53. *Milner v. Milnes*, 3 T. R. 631.

(y) *Eyres v. Coward*, 1 Sid. 337.
O'Brian v. Ram, 3 Mod. 186. Bar.
Abr. Baron & Feme (F).

(z) Rolle Abr. 351, G. pl. 2. *Heard v. Stamford*, 3 P. Wms. 411.

(a) *Woodman v. Chapman*, 1 Campb. 188.

(b) *Lockwood v. Salter*, 5 B. & Ad. 303. *Miles v. Williams*, 1 P. Wms. 249, 257.

(c) *Chubb v. Stretch*, L. R., 9 Eq. 555.

¹ See *ante*, pp. 258-271 (§§ 162-175), and notes thereto.

² *Id.*

the Married Woman's Property Act, 1870, which provides (s. 22) that a husband shall not, by reason of any marriage that may take place after the coming into operation of the act, (*d*) be liable for the debts of his wife contracted before marriage; but she is liable to be sued for, and any property belonging to her for her separate use, is liable to satisfy, such debts as if she had continued unmarried. By the Married Woman's Property Act (1870), Amendment Act, 1874 (37 & 38 Vict. c. 50), s. 1, so much of the Married Woman's Property Act, 1870, as enacts that a husband shall not be liable for the debts of his wife contracted before marriage, is repealed so far as respects marriages which shall take place after the passing of the later Act, and a husband and wife married after the passing of the later Act may be jointly sued for any such debt.

By s. 2, the husband shall in such action, and in any action brought for damages sustained by reason of any tort committed by the wife before marriage, or by reason of the breach of any contract made by the wife before marriage, be liable for the debt or damages respectively to the extent only of the assets hereinafter specified; and, in addition to any other plea or pleas, may plead that he is not liable to pay the debt, or damages in respect of any such assets as hereinafter specified; or, confessing his liability to some amount, that he is not liable beyond what he so confesses; and, if no such plea is pleaded, the husband shall be deemed to have confessed his liability so far as assets are concerned.

By s. 3, if it is not found in such action that the husband is liable in respect of any such assets, he shall have judgment for his costs of defense, whatever the result of the action may be against the wife.

(*d*) Aug. 9, 1870.

By s. 4, when a husband and wife are sued jointly, if by confession or otherwise it appears that the husband is liable for the debt or damages recovered or any part thereof, the judgment, to the extent of the amount for which the husband is liable, shall be a joint judgment against the husband and wife, and as to the residue, if any, of such debt or damages the judgment shall be a separate judgment against the wife.

By s. 5, the assets in respect of, and to the extent of, which the husband shall in any such action be liable, are as follows:

(1) The value of the personal estate in possession of the wife which shall have vested in the husband.

(2) The value of the choses in action of the wife which the husband shall have reduced into possession, or which, with reasonable diligence, he might have reduced into possession.

(3) The value of the chattels real of the wife which shall have vested in the husband and wife.

(4) The value of the rents and profits of the real estate of the wife which the husband shall have received, or, with reasonable diligence, might have received.

(5) The value of the husband's estate or interest in any property, real or personal, which the wife in contemplation of the marriage with him, shall have transferred to him or to any other person.

(6) The value of any property, real or personal, which the wife, in contemplation of her marriage with the husband, shall, with his consent, have transferred to any person, with the view of defeating or delaying her existing creditors.

Provided that, when the husband after marriage pays any debt of his wife, or has a judgment bona fide

recovered against him in any such action as is in this act mentioned, then, to the extent of such payment or judgment, the husband shall not in any subsequent action be liable.

469. *Liabilities of the surviving wife.*—All debts contracted by the wife prior to the marriage, and which have not been barred by the statute of limitations, survive against her on the death of her husband; and she may then be charged with the payment of them. (e)

(e) *Woodman v. Chapman*, 1 Campb. 188.

SECTION V.

TRANSFER BY BANKRUPTCY¹

470. *Effect of an adjudication in bankruptcy.*—Immediately upon the adjudication, the choses in action and obligations of the bankrupt vest in the re-

¹ Following is the text of the present Bankrupt law of the United States. Revised Statutes, Revision of 1874, as amended June 22, 1874:

SEC. 4972.—The jurisdiction conferred upon the district courts as courts of bankruptcy shall extend—

First. To all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy.

Second. To the collection of all the assets of the bankrupt.

Third. To the ascertainment and liquidation of the liens and other specific claims thereon.

Fourth. To the adjustment of the various priorities and conflicting interests of all parties.

Fifth. To the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties, and due distribution of the assets among all the creditors.

Sixth. To all acts, matters, and things to be done under and in virtue the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy. (Act of June 22, 1874, § 2.) Provided, That the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the State where such bankrupt resides, having jurisdiction of claims of such nature and amount.

SEC. 4973.—The district courts shall be always open for the transaction of business in the exercise of their jurisdiction as courts of bankruptcy; and their powers and jurisdiction as such courts shall be exercised as well in vacation as in term time; and a judge sitting at chambers shall have the same powers and

gistrar, and upon the appointment of a trustee they forthwith pass to and vest in the trustee; (f) and they are to be deemed to have been duly assigned to

(f) 32 & 53 Vict. c. 71, s. 17.

jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court.

SEC. 4974.—A district court may sit for the transaction of business in bankruptcy, at any place within the district, of which place and of the time of commencing session the court shall have given notice, as well at the places designated by law for holding sessions of such court.

SEC. 4975.—The districts courts as courts of bankruptcy shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein in equity.

SEC. 4976.—In case of a vacancy in the office of district judge in any district, or in case any district judge shall, from sickness, absence, or other disability, be unable to act, the circuit judge of the circuit in which such district is included may make, during such disability or vacancy, all necessary rules and orders preparatory to the final hearing of all causes in bankruptcy, and cause the same to be entered or issued, as the case may require, by the clerk of the district court.

SEC. 4977.—The same jurisdiction, power, and authority which are hereby conferred upon the district courts in cases in bankruptcy are also conferred upon the supreme court of the District of Columbia, when the bankrupt resides in that District.

SEC. 4978.—The same jurisdiction, power, and authority which are hereby conferred upon the district courts in cases in bankruptcy are also conferred upon the (act of June 22, 1874, § 16) district courts of the several territories (act of June 22, 1874, § 16), subject to the general superintendence and jurisdiction conferred upon circuit courts by section four thousand nine hundred and eighty-six [two], when the bankrupt resides in either of the Territories. This jurisdiction may be exercised, upon petitions regularly filed in such courts, by either of the justices thereof while holding the district court in the district in which the petitioner or the alleged bankrupt resides.

SEC. 4979.—The several circuit courts shall have, within each district, concurrent jurisdiction with the district court of (act of June 22, 1874, § 3) any district, whether the powers and jurisdiction of a circuit court have been conferred on such

the trustee for the purpose of his instituting an action for their recovery. (*g*)

Under the former acts it was held, that the usual

(*g*) Sect. 22.

district court or not, of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest (act of June 22, 1874, § 3), or owing any debt to such bankrupt, or by such person against an assignee, touching any property or rights of the bankrupt, transferable to or vested in such assignee.

SEC. 4980.—Appeals may be taken from the district to the circuit courts, in all cases in equity, and writs of error from the circuit courts to the district courts may be allowed in cases at law arising under or authorized by this Title, when the debt or damages claimed amount to more than five hundred dollars; and any supposed creditor whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the district court to the circuit court for the same district.

SEC. 4981.—No appeal shall be allowed in any case from the district to the circuit court unless it is claimed, and notice given thereof to the clerk of the district court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from; nor unless the appellant at the time of claiming the same shall give bond in the manner required in cases of appeals in suits in equity; nor shall any writ of error be allowed unless the party claiming it shall comply with the provisions of law regulating the granting of such writs.

SEC. 4982.—Such appeal shall be entered at the term of the circuit court which shall be held within the district next after the expiration of ten days from the time of claiming the same.

SEC. 4983.—If the appellant in writing waives his appeal before any decision thereon, proceedings may be had in the district court as if no appeal had been taken.

SEC. 4984.—A supposed creditor who takes an appeal to the circuit court from the decision of the district court, rejecting his claim in whole or in part, shall, upon entering his appeal in the circuit court, file in the clerk's office thereof, a statement in writing of his claim, setting forth the same, substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner

covenant in a lease, not to underlet or assign, would not prevent the transfer of the lease to the assignees if they thought fit to claim it. (*h*) Trustees in bank-

(*h*) *Doe v. Beavan*, 3 Mees. & 57, 300. *Doe v. Smith*, 5 Taunt. S. 353. *Doe v. Carter*, 8 Term R. 795.

and like proceedings shall thereupon be had in the pleadings, trial, and determination of the cause, as in actions at law commenced and prosecuted, in the usual manner, in the courts of the United States, except that no execution shall be awarded against the assignee for the amount of a debt found due to the creditor.

SEC. 4985.—The final judgment of the circuit court, rendered upon any appeal provided for in the preceding section, shall be conclusive, and the list of debts shall, if necessary, be altered to conform thereto. The party prevailing in the suit shall be entitled to costs against the adverse party, to be taxed and recovered as in suits at law; if recovered against the assignee, they shall be allowed out of the estate.

SEC. 4986.—The circuit court for each district shall have a general superintendence and jurisdiction of all cases and questions arising in the district court for such district when sitting as a court of bankruptcy, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not; and except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case as in a court of equity; and the powers and jurisdiction hereby granted may be exercised either by the court in term time, or, in vacation, by the circuit justice or by the circuit judge of the circuit.

SEC. 4987.—The several supreme courts of the Territories shall have the same general superintendence and jurisdiction over the acts and decisions of the justices thereof in cases of bankruptcy as is conferred on the circuit courts over proceedings in the district courts.

SEC. 4988.—In districts which are not within any organized circuits of the United States, the power and jurisdiction of a circuit court in bankruptcy may be exercised by the district judge.

SEC. 4989.—No appeal or writ of error shall be allowed in any case arising under this Title from the circuit courts to the supreme court, unless the matter in dispute in such case exceeds two thousand dollars.

ruptcy possess the same remedies for the recovery of the bankrupt's debts and choses in action, and for the recovery of unliquidated damages for breaches of con-

SEC. 4990.—The general orders in bankruptcy heretofore adopted by the justices of the supreme court, as now existing, may be followed in proceedings under this Title; and the justices may, from time to time, subject to the provisions of this Title, rescind or vary any of those general orders, and may frame, rescind, or vary other general orders for the following purposes:

First. For regulating the practice and procedure of the district courts in bankruptcy, and the forms of petitions, orders, and other proceedings to be used in such courts in all matters under this Title.

Second. For regulating the duties of the various officers of such courts.

Third. For regulating the fees payable and the charges and costs to be allowed (act of June 22, 1874, § 18), with respect to all proceedings in bankruptcy before such courts, not exceeding the rate of fees now allowed by law for similar services in other proceedings.

Fourth. For regulatiug the practice and procedure upon appeals.

Fifth. For regulating the filing, custody, and inspection of records.

Sixth. And generally for carrying the provisions of this Title into effect.

All such general orders shall from time to time be reported to Congress, with such suggestions as the justices may think proper.

(Act of June 22, 1874, § 18.) And said justices shall have power under said sections, by general regulations, to simplify, and so far as in their judgment will conduce to the benefit of creditors, to consolidate the duties of the register, assignee, marshal, and clerk, and to reduce fees, costs, and charges, to the end that prolixity, delay, and unnecessary expense may be avoided.

SEC. 4991.—The filing of the petition for an adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, shall be deemed to be the commencement of proceedings in bankruptcy.

SEC. 4992.—The proceedings in all cases of bankruptcy shall be deemed matters of record, but the same shall not be required to be recorded at large, but shall be carefully filed,

tract, in which the bankrupt is beneficially interested, as the bankrupt himself would have had, had he not become bankrupt. (i) His rights are their rights;

(i) *Wright v. Fairfield.* 2 Barn. Mees. & Sc. 141; 9 Bingham, & Ad. 727. *Porter v. Vorley,* 2 93.

kept, and numbered in the office of the clerk of the court, and a docket only, or short memorandum thereof, kept in books to be provided for that purpose, which shall be open to public inspection. Copies of such records, duly certified under the seal of the court, shall in all cases be presumptive evidence of the facts therein stated.

SEC. 4993.—Each district judge shall appoint, upon the nomination and recommendation of the Chief Justice of the Supreme Court, one or more registers in bankruptcy when any vacancy occurs in such office, to assist him in the performance of his duties under this Title, unless he shall deem the continuance of the particular office unnecessary.

SEC. 4994.—No person shall be eligible for appointment as register in bankruptcy, unless he is a counselor of the district court for the district in which he is appointed, or of some one of the courts of record of the State in which he resides.

SEC. 4995.—Before entering upon the duties of his office, every person appointed a register in bankruptcy shall give a bond to the United States, for the faithful discharge of the duties of his office, in a sum not less than one thousand dollars, to be fixed by the district judge, with sureties satisfactory to such judge; and he shall, in open court, take and subscribe the oath prescribed in section seventeen hundred and fifty-five, Title PROVISIONS APPLICABLE TO SEVERAL CLASSES OF OFFICERS, and also an oath that he will not, during his continuance in office, be, directly or indirectly, interested in or benefited by the fees or emoluments arising from any suit or matter pending in bankruptcy, in either the district or circuit court in his district.

SEC. 4996 (amended by act of June 22, 1874, § 18).—No register or clerk of court, or any partner or clerk of such register or clerk of court, or any person having any interest with either in any fees or emoluments in bankruptcy, or with whom such register or clerk of court shall have any interest in respect to any matter in bankruptcy, shall be of counsel, solicitor, or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, or in an appeal therefrom. Nor shall

and the damages due to him, in respect of his personal estate, are due to them. (*k*) The trustees represent the creditors for all purposes, as well as the bankrupt

(*k*) *Hill v. Smith*, 12 M. & W. 630. *Wetherell v. Julius*, 10 C. B. 280. *Beckman v. Drake*, 2 H. L. C. 616. *Stanton v. Collier*, 3 El. & Bl. 274.

they, or either of them, be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of, or upon any estate within the jurisdiction of either of said courts of bankruptcy; nor be interested, directly or indirectly, in the fees or emoluments arising from either of said trusts.

SEC. 4997.—Registers are subject to removal from office by the judge of the district court.

SEC. 4998.—Every register in bankruptcy has power :

First. To make adjudication of bankruptcy in cases unopposed.

Second. To receive the surrender of any bankrupt.

Third. To administer oaths in all proceedings before him.

Fourth. To hold and preside at meetings of creditors.

Fifth. To take proof of debts.

Sixth. To make all computations of dividends, and all orders of distribution.

Seventh. To furnish the assignee with a certified copy of such orders, and of the schedules of creditors and assets filed in each case.

Eighth. To audit and pass accounts of assignees.

Ninth. To grant protection.

Tenth. To pass the last examination of any bankrupt in cases whenever the assignee or a creditor do not oppose.

Eleventh. To sit in chambers and dispatch there such part of the administrative business of the court, and such uncontested matters as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct.

SEC. 4999.—No register shall have power to commit for contempt, or to make adjudication of bankruptcy when opposed; or to decide upon the allowance or suspension of an order of discharge.

SEC. 5000.—Every register shall make short memoranda of his proceedings in each case in which he acts, in a docket to be kept by him for that purpose, and shall forthwith, as the proceedings are taken, forward to the clerk of the district court a certified copy of these memoranda, which shall be entered by the clerk in the proper minute-book to be kept in his office.

himself; and, if any fraud exists in a transaction to which the bankrupt was a party, they may take advantage of it for the benefit of the creditors, (1) and

(1) *Doe v. Ball*, 11 M. & W. 533.

SEC. 5001.—The judge of the district court may direct a register to attend at any place within the district for the purpose of hearing such voluntary applications under this Title as may not be opposed, of attending any meetings of creditors, or receiving any proof of debts, and, generally, for the prosecution of any proceedings under this Title.

SEC. 5002.—Every register so acting shall have and exercise all powers, except the power of commitment, vested in the district court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers, and documents.

SEC. 5003.—Evidence or examination in any of the proceedings under this Title may be taken before the court, or a register in bankruptcy, viva voce or in writing, before a commissioner of the circuit court, or by affidavit, or on commission, and the court may direct a reference to a register in bankruptcy, or other suitable person, to take and certify such examination, and may compel the attendance of witnesses, the production of books and papers, and the giving of testimony in the same manner as in suits in equity in the circuit court.

SEC. 5004.—All depositions of persons and witnesses taken before a register, and all acts done by him, shall be reduced to writing, and be signed by him, and shall be filed in the clerk's office as part of the proceedings. He shall have power to administer oaths in all cases, and in relation to all matters in which oaths may be administered by commissioners of circuit courts.

SEC. 5005.—Parties and witnesses summoned before a register shall be bound to attend in pursuance of such summons at the place and time designated therein, and shall be entitled to protection, and be liable to process of contempt in like manner as parties and witnesses are now liable thereto in case of default in attendance under any writ of subpoena.

SEC. 5006.—Whenever any person examined before a register refuses or declines to answer, or to swear to or sign his examination when taken, the register shall refer the matter to the judge, who shall have power to order the person so acting to pay the costs thereby occasioned, and to punish him for contempt, if such person be compellable by law to answer such question or to sign such examination.

may consequently make claims which the bankrupt himself would be estopped from doing. (*m*) They may recover money received by agents of the bank-

(*m*) *Russell v. Bell*, 10 M. & W. 352.

SEC. 5007.—Any register may act in the place of any other register appointed by and for the same district court.

SEC. 5008.—The fees of registers, as established by law or by rules and orders framed pursuant to law, shall be paid to them by the parties for whom the services may be rendered.

SEC. 5009.—In all matters where an issue of fact or of law is raised and contested by any party to the proceedings before any register, he shall cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge.

SEC. 5010.—Any party shall, during the proceedings before a register, be at liberty to take the opinion of the district judge upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the register in the shape of a short certificate to the judge, who shall sign the same if he approve thereof; and such certificate so signed, shall be binding on all the parties to the proceeding; but every such certificate may be discharged or varied by the judge at chambers or in open court.

SEC. 5011.—In any proceedings within the jurisdiction of the court, under this Title, the parties concerned, or submitting to such jurisdiction, may at any stage of the proceedings, by consent, state any question in a special case for the opinion of the court, and the judgment of the court shall be final unless it is agreed and stated in the special case that either party may appeal, if, in such case, an appeal is allowed by this Title. The parties may also, if they think fit, agree, that upon the questions raised by such special case being finally decided, a sum of money, fixed by the parties, or to be ascertained by the court, or in such a manner as the court may direct, or any property, or the amount of any disputed debt or claim shall be paid, delivered, or transferred by one of such parties to the other of them, either with or without costs.

SEC. 5012.—If any judge, register, clerk, marshal, messenger, assignee, or any other officer of the several courts of bankruptcy shall, for anything done or pretended to be done under this Title, or under color of doing anything thereunder, willfully demand or take, or appoint or allow any person whatever to take for him, or on his account, or for or on account of any other person, or in trust for him or for any other

rupt, and paid over to the latter after the act of bankruptcy; they may also recover the money from a creditor, who has received payment of his debt after an person, any fee, emolument, gratuity, sum of money, or anything of value whatever, other than is allowed by law, such person shall forfeit and pay a sum not less than three hundred dollars and not more than five hundred dollars, and be imprisoned not exceeding three years.

SEC. 5013.—In this Title the word “assignee,” and the word “creditor,” shall include the plural also; and the word “messenger” shall include his assistant or assistants, except in the provision for the fees of that officer. The word “marshal” shall include the marshal’s deputies; the word “person” shall also include “corporation;” and the word “oath” shall include “affirmation.” And in all cases in which any particular number of days is prescribed by this Title, or shall be mentioned in any rule or order of court or general order which shall at any time be made under this Title, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall fall on a Sunday, Christmas day, or on any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the Fourth of July, in which case the time shall be reckoned exclusive of that day also.

SEC. 5014.—If any person residing within the jurisdiction of the United States, and owing debts provable in bankruptcy exceeding the amount of three hundred dollars, shall apply by petition addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next preceding the time of filing such petition, or for the longest period during such six months, setting forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain a discharge from his debts, and shall annex to his petition a schedule, and inventory (act of June 22, 1874, § 15) and valuation, in compliance with the next two sections, the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt.

SEC. 5015.—The said schedule must contain a full and true statement of all his debts, exhibiting, as far as possible, to whom each debt is due, the place of residence of each creditor, if known to the debtor, and if not known, the fact that it is

act of bankruptcy by way of fraudulent preference, or has enforced payment in a foreign country of a debt due to him from the bankrupt, having at the time, not known; also the sum due to each creditor; the nature of each debt or demand, whether founded on written security, obligation, or contract, or otherwise; the true cause and consideration of the indebtedness in each case, and the place where such indebtedness accrued; and also a statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for the payment of the same.

SEC. 5016.—The said inventory must contain an accurate statement of all the petitioner's estate, both real and personal, assignable under this Title, describing the same and stating where it is situated, and whether there are any, and, if so, what incumbrances thereon.

SEC. 5017.—The schedule and inventory must be verified by the oath of the petitioner, which may be taken either before the district judge, or before a register, or before a commissioner of the circuit court.

SEC. 5018.—Every citizen of the United States petitioning to be declared bankrupt, shall, on filing his petition, and before any proceedings thereon, take and subscribe an oath of allegiance and fidelity to the United States, which oath may be taken before either of the officers mentioned in the preceding section, and shall be filed and recorded with the proceedings in bankruptcy.

SEC. 5019.—Upon the filing of such petition, schedule, and inventory, the judge or register shall forthwith, if he is satisfied that the debts due from the petitioner exceed three hundred dollars, issue a warrant, to be signed by such judge or register, directed to the marshal for the district, authorizing him forthwith, as messenger, to publish notices in such newspapers (act of June 22, 1874, § 5) as the marshal shall select, not exceeding two; to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor; and to give such personal or other notice to any persons concerned as the warrant specifies (act of June 22, 1874, § 5). But whenever the creditors of the bankrupt are so numerous as to make any notice now required by law to them, by mail or otherwise, a great and disproportionate expense to the estate, the court may, in lieu thereof, in its discretion, order such notice to be given by publication in a newspaper, or newspapers, to all such credi-

notice of the bankruptcy. (n) Whenever a third party has received money of the bankrupt under circumstances that create a right to recover it back, the trustees may sue for and recover it. (o)

(n) *Hunter v. Potts*, 4 T. R. 182. (o) *Brandon v. Pate*, 2 H. Bl. Sill *v. Worswick*, 1 H. Bl. 665. Phil- 308. *Holmes v. Walsh*, 7 T. R. lips *v. Hunter*, 2 Id. 402. 458.

tors whose claims, as reported, do not exceed the sums, respectively, of fifty dollars.

SEC. 5020.—Every bankrupt shall be at liberty, from [time] to time, upon oath, to amend and correct his schedule of creditors and property, so that the same shall conform to the facts.

SEC. 5021, amended by act of June 22, 1874, § 12.—That any person residing, and owing debts, as aforesaid, who, after the passage of this act, shall depart from the State, District, or Territory of which he is an inhabitant, with intent to defraud his creditors; or, being absent, shall, with such intent, remain absent; or shall conceal himself to avoid the service of legal process in any action for the recovery of a debt or demand provable under this act; or shall conceal or remove any of his property to avoid its being attached, taken, or sequestered on legal process; or shall make any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors; or who has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any court of the United States, or of any State, District, or Territory within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate under this act, and for a sum exceeding one hundred dollars, and such process is remaining in force and not discharged by payment, or in any other manner provided by the law of the United States, or of such State, District, or Territory, applicable thereto, for a period of twenty days; or has been actually imprisoned for more than twenty days in a civil action founded on contract for the sum of one hundred dollars or upward; or who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or confess judgment, or give any warrant to confess judgment, or procure his property to be

471. *Executory contracts.*—Among the beneficial rights and interests which pass to the trustees by virtue of their appointment, are executory contracts taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this act; or who, being a bank, banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment, or who being a bank, banker, broker, merchant, trader, manufacturer, or miner, has stopped or suspended and not resumed payment, within a period of forty days, of his commercial paper (made or passed in the course of his business as such), or who, being a bank or banker, shall fail for forty days to pay any depositor upon demand of payment lawfully made, shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable: Provided, That such petition is brought within six months after such act of bankruptcy shall have been committed. And the provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy commenced since the first day of December, eighteen hundred and seventy-three, as well as to those commenced hereafter. And in all cases commenced since the first day of December, eighteen hundred and seventy-three, and prior to the passage of this act, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor, by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt. But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court (if satisfied that the admission was made in good faith) shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject. And if it shall appear that such number and amount have not so petitioned

in which the bankrupt is interested, and from which benefit may accrue to the estate, and which can be performed on the part of the bankrupt by the trustees the court shall grant reasonable time, not exceeding, in cases heretofore commenced, twenty days, and in cases hereafter commenced, ten days, within which other creditors may join in such petition. And if, at the expiration of such time so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, at the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed, and, in cases hereafter commenced, with costs. And if such person shall be adjudged a bankrupt, the assignee may recover back the money or property so paid, conveyed, sold, assigned, or transferred, contrary to this act: Provided, That the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended; and such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt; and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy. And the petition of creditors under this section may be sufficiently verified by the oaths of the first five signers thereof, if so many there be. And if any of said first five signers shall not reside in the district in which such petition is to be filed, the same may be signed and verified by the oath or oaths of the attorney or attorneys, agent or agents, of such signers. And in computing the number of creditors, as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars shall not be reckoned. But if there be no creditors whose debts exceed said sum of two hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding two hundred and fifty dollars fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purpose aforesaid.

SEC. 5022.—Any act of bankruptcy committed since the second day of March, eighteen hundred and sixty-seven, may be the foundation of an adjudication of involuntary bankruptcy, upon a petition filed within the time prescribed by law, equally with one committed hereafter.

SEC. 5023.—[This section is repealed by act of June 22, 1874, § 12.]

themselves. The bankruptcy has no other effect on these contracts than to put the trustees in the place of the bankrupt, neither rescinding the obligations of

SEC. 5024.—Upon the filing of the petition authorized by the preceding section, if it appears that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted. The court may also, by injunction, restrain the debtor, and any other person, in the meantime, from making any transfer or disposition of any part of the debtor's property not excepted by this Title from the operation thereof, and from any interference therewith; and if it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or to make any fraudulent conveyance or disposition thereof, the court may issue a warrant to the marshal of the district, commanding him to arrest and safely keep the alleged debtor, unless he shall give bail to the satisfaction of the court for his appearance from time to time, as required by the court, until its decision upon the petition, or until its further order, and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court.

SEC. 5025.—A copy of the petition and order to show cause shall be served on the debtor by delivering the same to him personally, or leaving the same at his last or usual place of abode; or, if the debtor cannot be found, and his place of residence cannot be ascertained, service shall be made by publication in such manner as the judge may direct. No further proceedings, unless the debtor appears and consents thereto, shall be had until proof has been given, to the satisfaction of the court, of such service or publication; and if such proof is not given on the return day of such order, the proceedings shall be adjourned, and an order made that the notice be forthwith so served or published. (Act of June 22, 1874, § 13.) And if, on the return day of the order to show cause as aforesaid, the court shall be satisfied that the requirement of section five thousand and twenty-one [thirty-nine] of said act as to the number and amount of petitioning creditors has been complied with, or if, within the time provided for in section five thou

either party, nor imposing new ones. (p). The trustees consequently may sue upon all executory contracts of sale entered into with the bankrupt, either

(p) *Gibson v. Carruthers*, 8 M. & W. 333.

sand and twenty-one [thirty-nine] of this act, creditors sufficient in number and amount shall sign such petition so as to make a total of one-fourth in number of the creditors and one-third in the amount of the provable debts against the bankrupt, as provided in said section, the court shall so adjudge, which judgment shall be final; otherwise it shall dismiss the proceedings, and, in cases hereafter commenced, with costs.

SEC. 5026.—On such return day, or adjourned day, if the notice has been duly served or published, or is waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demands, in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of the alleged bankruptcy. (Act of June 22, 1874, § 14.) Or, at the election of the debtor, the court may, in its discretion, award a *venire facias* to the marshal of the district, returnable within ten days before him, for the trial of the facts set forth in the petition, at which time the trial shall be had, unless adjourned for cause. And unless, upon such hearing or trial, it shall appear to the satisfaction of said court, or of the jury, as the case may be, that the facts set forth in said petition are true, or if it shall appear that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens was the sole ground of the proceeding, the proceeding shall be dismissed, and the respondent shall recover costs; and all proceedings in bankruptcy may be discontinued on reasonable notice and hearing, with the approval of the court, and upon the assent, in writing, of such debtor and not less than one-half of his creditors, in number and amount; or in case all the creditors and such debtor assent thereto, such discontinuance shall be ordered and entered; and all parties shall be remitted, in either case, to the same rights and duties existing at the date of the filing of the petition for bankruptcy, except so far as such estate shall have been already administered and disposed of. And the court shall have power to make all needful orders and decrees to carry the foregoing provision into effect. If the petitioning creditor does not

for the non-delivery of goods and chattels, stock or shares, purchased by the bankrupt, or for the non-acceptance of property sold by him. (g) And the bank-

(g) *Boorman v. Nash*, 9 B. & C. 152.

appear and proceed on the return day, or adjourned day, the court may, upon the petition of any other creditor to the required amount, proceed to adjudicate on such petition, without requiring a new service or publication of notice to the debtor.

SEC. 5027.—[This section is repealed by act of June 22, 1874, § 14.]

SEC. 5028.—If upon the hearing or trial the facts set forth in the petition are found to be true, or if upon default made by the debtor to appear pursuant to the order, due proof of service thereof is made, the court shall adjudge the debtor to be a bankrupt, and shall forthwith issue a warrant to take possession of his estate.

SEC. 5029.—The warrant shall be directed, and the property of the debtor shall be taken thereon, and shall be assigned and distributed in the same manner and with similar proceedings to those hereinbefore provided for the taking possession, assignment, and distribution of the property of the debtor upon his own petition.

SEC. 5030.—The order of adjudication of bankruptcy shall require the bankrupt forthwith, or within such number of days, not exceeding five, after the date of the order or notice thereof, as shall by the order be prescribed, to make and deliver, or transmit by mail, post-paid, to the messenger, a schedule of the creditors and an inventory (act of June 22, 1874, § 15) and valuation of his estate in the form, and verified in the manner required of a petitioning debtor.

SEC. 5031.—If the debtor has failed to appear in person, or by attorney, a certified copy of the adjudication shall be forthwith served on him by delivery or publication in the manner hereinbefore provided for the service of the order to show cause: and if the bankrupt is absent or cannot be found, such schedule and inventory shall be prepared by the messenger and the assignee from the best information they can obtain

SEC. 5032.—The notice to creditors under warrant shall state:

First. That a warrant in bankruptcy has been issued against the estate of the debtor.

rupt cannot, by stipulations inserted in a contract made by him with third parties, restrict the legal rights of the trustees, or deprive them of property, or

Second. That the payment of any debts and the delivery of any property belonging to such debtor to him or for his use, and the transfer of any property by him, are forbidden by law.

Third. That a meeting of the creditors of the debtor, giving the names, residences, and amounts, so far as known, to prove their debts and choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same.

SEC. 5033.—At the meeting held in pursuance of the notice, one of the registers of the court shall preside, and the messenger shall make return of the warrant and of his doings thereon; and if it appears that the notice to the creditors has not been given as required in the warrant, the meeting shall forthwith be adjourned, and a new notice given as required.

SEC. 5034.—The creditors shall, at the first meeting held after due notice from the messenger, in presence of a register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and in number of the creditors who have proved their debts. If no choice is made by the creditors at the meeting, the judge, or if there be no opposing interest, the register, shall appoint one or more assignees. If an assignee, so chosen or appointed, fails within five days to express in writing his acceptance of the trust, the judge or register may fill the vacancy. All elections or appointments of assignees shall be subject to the approval of the judge; and when in his judgment it is for any cause needful or expedient, he may appoint additional assignees, or order a new election.

SEC. 5035.—No person who has received any preference contrary to the provisions of this Title shall vote for or be eligible as assignee; but no title to property, real or personal, sold, transferred, or conveyed by an assignee, shall be affected or impaired by reason of his ineligibility.

SEC. 5036.—The district judge at any time may, and upon the request in writing of any creditor who has proved his claim shall, require the assignee to give good and sufficient bond to the United States, with a condition for the faithful performance and discharge of his duties; the bond shall be approved by the judge or register by his endorsement thereon, shall be filed with the record of the case, and inure to the benefit of all cred-

of the benefit of a contract, to which they would otherwise be entitled. (r) All that the trustees are bound to do is to fulfill the bankrupt's part of the en-

(r) *Tripp v. Armitage*, 4 M. & W. 699.

ltors proving their claims, and may be prosecuted in the name and for the benefit of any injured party. If the assignee fails to give the bond within such time as the judge or register orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place.

SEC. 5037.—Any assignee who refuses or unreasonably neglects to execute an instrument when lawfully required by the court, or disobeys a lawful order or decree of the court in the premises, may be punished as for a contempt of court.

SEC. 5038.—An assignee may, with the consent of the judge, resign his trust and be discharged therefrom.

SEC. 5039.—The court, after due notice and hearing, may remove an assignee for any cause which, in its judgment, renders such removal necessary or expedient. At a meeting called for the purpose by order of the court in its discretion, or called upon the application of a majority of the creditors in number and value, the creditors may, with consent of the court, remove any assignee by such a vote as is provided for the choice of assignee.

SEC. 5040.—The resignation or removal of an assignee shall in no way release him from performing all things requisite on his part for the proper closing up of his trust and the transmission thereof to his successors, nor shall it affect the liability of the principal or surety on the bond given by the assignee.

SEC. 5041.—Vacancies caused by death or otherwise in the office of assignee may be filled by appointment of the court, or at its discretion by an election by the creditors, in the same manner as in the original choice of an assignee, at a regular meeting, or at a meeting called for the purpose, with such notice thereof in writing to all known creditors, and by such person as the court shall direct.

SEC. 5042.—When, by death or otherwise, the number of assignees is reduced, the estate of the debtor not lawfully disposed of shall vest in the remaining assignee or assignees, and the persons selected to fill vacancies, if any, with the same powers and duties relative thereto as if they were originally chosen.

SEC. 5043.—Any former assignee, his executors or adminis-

gagement when the proper time arrives. If they expressly waive the contract, or, without any express waiver, if, at the proper time, they omit to do what by traitors, upon request, and at the expense of the estate, shall make and execute to the new assignee all deeds, conveyances, and assurances, and do all other lawful acts requisite to enable him to recover and receive all the estate. And the court may make all orders which it may deem expedient to secure the proper fulfillment of the duties of any former assignee, and the rights and interests of all persons interested in the estate.

SEC. 5044.—As soon as an assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings.

SEC. 5045.—There shall be excepted, from the operation of the conveyance, the necessary household and kitchen furniture, and such other articles and necessities of the bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; also the wearing apparel of the bankrupt, and that of his wife and children, and the uniform, arms, and equipments of any person who is or has been a soldier in the militia, or in the service of the United States; and such other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by the laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the constitution and laws of each state, as existing in the year eighteen hundred and seventy-one; and such exemptions shall be valid against

the terms of the contract they are bound to do, in the first case they certainly will, and in the second they probably may, absolve the other party from all obligations contracted before the adoption and passage of such state constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any state court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding. These exceptions shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignee; and in no case shall the property, hereby excepted, pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this title; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court.

SEC. 5046.—All the property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent rights and copyrights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract or from the unlawful taking or detention, or injury to the property of the bankrupt; and all his rights of redeeming such property or estate; together with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section, be at once vested in such assignee.

SEC. 5047.—The assignee shall have the like remedy to recover all the estate, debts, and effects in his own name as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. If, at the time of the commencement of the proceedings in bankruptcy, an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him. And if any suit at law or in equity, in which the bankrupt is a party in his own name, is pending at the time of the adjudication of bankruptcy, the assignee may defend

tion towards them. (s) Some executory contracts, founded upon the personal skill and talent of the bankrupt, or upon a mutuality of obligation and

(s) *Gibson v. Carruthers*, 8 M. & W. 329.

the same in the same manner and with the like effect as it might have been defended by the bankrupt.

SEC. 5048.—No suit pending in the name of the assignee shall be abated by his death or removal; but, upon the motion of the surviving or remaining or new assignee, as the case may be, he shall be admitted to prosecute the suit in like manner and with like effect as if it had been originally commenced by him.

SEC. 5049.—A copy, duly certified by the clerk of the court under the seal thereof, of the assignment, shall be conclusive evidence of the title of the assignee to take, hold, sue for, and recover the property of the bankrupt.

SEC. 5050.—No person shall be entitled, as against the assignee, to withhold from him possession of any books of account of the bankrupt, or claim any lien thereon.

SEC. 5051.—The debtor shall, at the request of the assignee and at the expense of the estate, make and execute any instruments, deeds, and writings which may be proper to enable the assignee to possess himself fully of all the assets of the bankrupt.

SEC. 5052.—No mortgage of any vessel or of any other goods or chattels, made as security for any debt, in good faith and for a present consideration and otherwise valid, and duly recorded pursuant to any statute of the United States or of any state, shall be invalidated or affected by an assignment in bankruptcy.

SEC. 5053.—No property held by the bankrupt in trust shall pass by the assignment.

SEC. 5054.—The assignee shall immediately give notice of his appointment, by publication at least once a week for three successive weeks in such newspapers as shall for that purpose be designated by the court, due regard being had to their general circulation in the district or in that portion of the district in which the bankrupt and his creditors shall reside, and shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States where a conveyance of any lands owned by the bankrupt ought by law to be recorded.

SEC. 5055.—The assignee shall demand and receive, from

liability, are discharged by the bankruptcy when nothing has been done under them; (t) but, if the bankrupt does execute the contract, the trustees may sue upon it on the completion of the work. (u)

(t) *Beckham v. Drake*, 11 M. & W. 315; 2 H. L. Cas. 579. *Knight v. W.* 808.
 Burgess, 33 L. J., Ch. 727.

all persons holding the same, all the estate assigned or intended to be assigned.

SEC. 5056.—No person shall be entitled to maintain an action against an assignee in bankruptcy for anything done by him as such assignee, without previously giving him twenty days' notice of such action, specifying the cause thereof, to the end that such assignee may have an opportunity of tendering amends, should he see fit to do so.

SEC. 5057.—No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed.

SEC. 5058.—[This section is superseded by act of June 22, 1874, § 4.]

SEC. 5059.—The assignee shall, as soon as may be, after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct from all other money in his possession; and shall, as far as practicable, keep all goods and effects belonging to the estate separate from all other goods in his possession, or designated by appropriate marks, so that they may be easily and clearly distinguished, and may not be liable to be taken as his property or for the payment of his debts.

SEC. 5060.—When it appears that the distribution of the estate may be delayed by litigation or other cause, the court may direct the temporary investment of the money belonging to such estate in securities to be approved by the judge or register, or may authorize it to be deposited in any convenient bank, upon such interest, not exceeding the legal rate, as the bank may contract with the assignee to pay thereon.

SEC. 5061.—The assignee, under the direction of the court, may submit any controversy arising in the settlement of de-

472. *Equitable interests not vesting in the trustees.*—If, by the assignment of a debt or other chose in action the bankrupt has given to the assignee of demands against the estate, or of debts due to it, to the determination of arbitrators, to be chosen by him and the other party to the controversy, and under such direction may compound and settle any such controversy, by agreement with the other party, as he thinks proper and most for the interest of the creditors.

SEC. 5062.—The assignee shall sell all such unincumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors; but, upon petition of any person interested, and for cause shown the court may make such order concerning the time, place, and manner of sale as will, in its opinion, prove to the interest of the creditors.

SEC. 5062 A (June 22, 1874, § 1).—That the court may, in its discretion, on sufficient cause shown, and upon notice and hearing, direct the receiver or assignee to take possession of the property, and carry on the business of the debtor, or any part thereof, under the direction of the court, when, in its judgment, the interest of the estate as well as of the creditors will be promoted thereby, but not for a period exceeding nine months from the time the debtor shall have been declared a bankrupt. Provided, that such order shall not be made until the court shall be satisfied that it is approved by a majority in value of the creditors.

SEC. 5062 B (June 22, 1874, § 4).—That, unless otherwise ordered by the court, the assignee shall sell the property of the bankrupt, whether real or personal, at public auction, in such parts or parcels, and at such times and places, as shall be best calculated to produce the greatest amount with the least expense. All notices of public sales under this act by any assignee or officer of the court, shall be published once a week for three consecutive weeks in the newspaper or newspapers to be designated by the judge, which, in his opinion, shall be best calculated to give general notice of the sale. And the court, on the application of any party in interest, shall have complete supervisory power over such sales, including the power to set aside the same and to order a resale, so that the property sold shall realize the largest sum. And the court may, in its discretion, order any real estate of the bankrupt, or any part thereof, to be sold for one-fourth cash at the time of sale, and the residue within eighteen months, in such in-

such debt an equitable claim thereto, no right of action passes to the trustees, (x) as the money, when recovered, is not distributable among the creditors. But,

(x) *Tibbits v. George*, 5 Ad. & E. 113.

stallments as the court may direct, bearing interest at the rate of seven per centum per annum, and secured by proper mortgage or lien upon the property so sold. And it shall be the duty of every assignee to keep a regular account of all moneys received or expended by him as such assignee, to which account every creditor shall, at reasonable times, have free access. If any assignee shall fail or neglect to well and faithfully discharge his duties in the sale or disposition of property as above contemplated, it shall be the duty of the court to remove such assignee, and he shall forfeit all fees and emoluments to which he might be entitled in connection with such sale. And if any assignee shall, in any manner, in violation of his duty aforesaid, unfairly or wrongfully sell, or dispose of, or in any manner fraudulently or corruptly combine, conspire, or agree with any person or persons, with intent to unfairly or wrongfully sell or dispose of the property committed to his charge, he shall, upon proof thereof, be removed, and forfeit all fees or other compensation for any and all services in connection with such bankrupt's estate. and upon conviction thereof before any court of competent jurisdiction, shall be liable to a fine of not more than ten thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both fine and imprisonment, at the discretion of the court. And any person so combining, conspiring, or agreeing with such assignee for the purpose aforesaid, shall, upon conviction, be liable to a like punishment. That the assignee shall report, under oath, to the court, at least as often as once in three months, the condition of the estate in his charge, and the state of his accounts in detail, and at all other times when the court, on motion or otherwise, shall so order. And on any settlement of the accounts of any assignee, he shall be required to account for all interest, benefit, or advantage received, or in any manner agreed to be received, directly or indirectly, from the use, disposal, or proceeds of the bankrupt's estate. And he shall be required, upon such settlement, to make and file in court an affidavit declaring, according to the truth, whether he has or has not, as the case may be, received, or is or is not, as the case may be, to receive, directly or indirectly, any interest, benefit, or advantage from the use

if the bankrupt possesses a legal interest and estate, with a possibility of a beneficial interest from which a benefit to his creditors may result, such legal interest or deposit of such funds: and such assignee may be examined orally upon the same subject, and if he shall willfully swear falsely, either in such affidavit or examination, or to his report provided for in this section, he shall be deemed to be guilty of perjury, and, on conviction thereof, be punished by imprisonment in the penitentiary not less than one and not more than five years.

SEC. 5063.—Whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent, or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any court. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale.

SEC. 5064.—The assignee may sell and assign under the direction of the court, and in such manner as the court shall order, any outstanding claims or other property, in his hands, due or belonging to the estate, which cannot be collected and received by him without unreasonable or inconvenient delay or expense.

SEC. 5065.—When it appears to the satisfaction of the court that the estate of the debtor, or any part thereof, is of a perishable nature, or liable to deteriorate in value, the court may order the same to be sold, in such manner as may be deemed most expedient, under the direction of the messenger or assignee, as the case may be, who shall hold the funds received in place of the estate disposed of.

SEC. 5066.—The assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien, or other incumbrance.

SEC. 5067.—All debts due and payable from the bankrupt

and possibility of benefit will pass to the assignees, if they think fit to claim it. (y) And, in the case of the assignment of a trade debt, if the debtor has re-

(y) *Carvalho v. Burn*, 4 Barn. Doe v. Steward, 1 Ad. & E. & Ad. 393; 1 Ad. & E. 883. 300.

at the time of the commencement of proceedings in bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest. When the bankrupt is liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate.

SEC. 5068.—In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividend; or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained.

SEC. 5069.—When the bankrupt is bound as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other speciality or contract, or for any debt of another person, but his liability does not become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability becomes fixed, and before the final dividend is declared.

SEC. 5070.—Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor if the creditor has proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of such a debt, but is still liable for the

ceived no notice of the assignment, the debt will remain in the order and disposition of the bankrupt, and will pass to the trustees. (2)

(2) Bankruptcy Act of 1869, s. 15 (5). *Buck v. Lee*, 1 Ad. & E. 804.

same or any part thereof, may, if the creditor fails or omits to prove such debt, prove the same either in the name of the creditor or otherwise, as may be provided by the general orders and subject to such regulations and limitations as may be established by such general orders.

SEC. 5071.—Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods.

SEC. 5072.—No debts other than those specified in the five preceding sections shall be proved or allowed against the estate.

SEC. 5073.—In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed in favor of any debtor to the bankrupt of a claim in its nature not provable against the estate, or of a claim purchased by or transferred to him after the filing of the petition (act of June 22, 1874, § 6), or in cases of compulsory bankruptcy, after the act of bankruptcy upon or in respect of which the adjudication shall be made, and with a view of making such set-off.

SEC. 5074.—When the bankrupt, at the time of adjudication, is liable upon any bill of exchange, promissory note, or other obligation in respect of distinct contracts as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader and also as a member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts.

SEC. 5075.—When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee,

If a bill of exchange has been indorsed merely for the accomodation of the bankrupt, then, as the latter has no right of action upon the bill against the ac-
or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt.

SEC. 5076.—Creditors residing within the judicial district where the proceedings in bankruptcy are pending shall prove their debts before one of the registers of the court, or before a commissioner of the circuit court within the said district. Creditors residing without the district but within the United States may prove their debts before a register in bankruptcy or a commissioner of a circuit court in the judicial district where such creditor or either one of joint creditors reside; but proof taken before a commissioner shall be subject to revision by the register of the court.

SEC. 5076 A (June 22, 1874, § 20).—That in addition to the officers now authorized to take a proof of debts against the estate of a bankrupt, notaries public are hereby authorized to take such proof, in the manner and under the regulations provided by law; such proof to be certified by the notary and attested by his signature and official seal.

SEC. 5077.—To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing, under oath, and signed by the deponent, setting forth the demand, the consideration thereof, whether any and what securities are held therefor, and whether any and what payments have been made thereon; that the sum claimed is justly due from the bankrupt to the claimant; that the claimant has not, nor has any other person, for his use, received any security or satisfaction whatever other than that by him set forth; that the claim was not procured for the purpose of influencing the proceedings in bankruptcy; and that no bargain or agreement, express or implied, has been made or entered into, by or on behalf of such credi-

ceptor, no right of action can pass to the trustees and, as the bill, in their hands, could not be made available for the benefit of the creditors, it does not tor, to sell, transfer, or dispose of the claim, or any part thereof, or to take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote or such creditor for assignee, or any action on the part of such creditor, or any other person in the proceedings, is or shall be in any way affected, influenced, or controlled. No claim shall be allowed unless all the statements set forth in such deposition shall appear to be true.

SEC. 5078.—Such oath shall be made by the claimant, testifying of his own knowledge, unless he is absent from the United States, or prevented by some other good cause from testifying, in which case the demand may be verified, by the attorney or authorized agent of the claimant, testifying to the best of his knowledge, information, and belief, and setting forth his means of knowledge. Corporations may verify their claims by the oath of their president, cashier, or treasurer. The court may require or receive further pertinent evidence either for or against the admission of any claim.

SEC. 5079.—Such oath may be taken in any district before any register or any commissioner of the circuit court authorized to administer oaths; or, if the creditor is in a foreign country, before any minister, consul, or vice-consul of the United States. When the proof is so made it shall be delivered or sent by mail to the register having charge of the case.

SEC. 5080.—If the proof is satisfactory to the register it shall be delivered or sent by mail to the assignee, who shall examine the same and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept by him for that purpose, the names of creditors who have proved their claims, in the order in which such proof is received, stating the time of receipt of such proof, and the amount and nature of the debts. Such books shall be open to the inspection of all the creditors. The court may require or receive further pertinent evidence either for or against the admission of any claim.

SEC. 5081.—The court may, on the application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of a claim, and may summon any person capable of giving evidence concerning such

pass to them, but remains with the bankrupt, who in several instances has indorsed the bill after his bankruptcy, so as to give to the bona fide indorsee a right proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake.

SEC. 5082.—A bill of exchange, promissory note, or other instrument used in evidence upon the proof of a claim, and left in court or deposited in the clerk's office, may be delivered, by the register or clerk having the custody thereof, to the person who used it, upon his filing a copy thereof, attested by the clerk of the court, who shall indorse upon it the name of the party against whose estate it has been proved, and the date and amount of any dividend declared thereon.

SEC. 5083.—When a claim is presented for proof before the election of the assignee, and the judge or register entertains doubts of its validity or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen.

SEC. 5084.—Any person who since the second day of March, eighteen hundred and sixty-seven, has accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provisions of the act of March two, eighteen hundred and sixty-seven, chapter one hundred and seventy-six, to establish a uniform system of bankruptcy, or to any provisions of this title, shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit, or advantage received by him under such preference.

SEC. 5085.—The court shall allow all debts duly proved, and shall cause a list thereof to be made and certified by one of the registers.

SEC. 5086.—The court may, on the application of the assignee, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination, on oath, upon all matters relating to the disposal or condition of his property, to his trade and dealings with others, to his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate, and the due settlement thereof according to law. Such examination shall be in

of action thereon against the accommodation acceptor.

(a) And it has been held that, if a bill has been delivered by the bankrupt for a valuable consideration

(a) *Wallace v. Hardacre*, 1 Camp. 46. *Willis v. Freeman*, 12 East, 660.

writing, and shall be signed by the bankrupt and filed with the other proceedings.

SEC. 5086 A (June 22, 1874, § 8).—That in all causes and trials arising or ordered under this act, the alleged bankrupt, and any party thereto, shall be a competent witness.

SEC. 5087.—The court may, in like manner, require the attendance of any other person as a witness, and if such person fails to attend, on being summoned thereto, the court may compel his attendance by warrant directed to the marshal, commanding him to arrest such person and bring him forthwith before the court, or before a register in bankruptcy, for examination as a witness.

SEC. 5088.—For good cause shown, the wife of any bankrupt may be required to attend before the court to the end that she may be examined as a witness; and if she does not attend at the time and place specified in the order, the bankrupt shall not be entitled to a discharge unless he proves to the satisfaction of the court that he was unable to procure her attendance.

SEC. 5089.—If the bankrupt is imprisoned, absent, or disabled from attendance, the court may order him to be produced by the jailor, or any officer in whose custody he may be, or may direct the examination to be had, taken, and certified at such time and place and in such manner as the court may deem proper, and with like effect as if such examination had been had in court.

SEC. 5090.—If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived.

SEC. 5091.—All creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate, pro rata, without any priority or preference whatever, except as allowed by section fifty-one hundred and one. No debt proved by any person liable, as bail, surety, or guarantee, or otherwise, for the bankrupt, shall be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable, and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct.

to another, so as to transfer to him the beneficial interest therein, the bankrupt may, after his bankruptcy, endorse the bill, and thus complete the legal title ; (b)

(b) *Watkins v. Maule*, 2 Jack. & Walk. 243. *Ex parte Greening*, 13 Ves. 206.

SEC. 5092.—At the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon request of the assignee, shall call a general meeting of the creditors, of which due notice shall be given, and the assignee shall then report, and exhibit to the court and to the creditors just and true accounts of all his receipts and payments, verified by his oath, and he shall also produce and file vouchers for all payments for which vouchers are required by any rule of the court ; he shall also submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt, and a statement of the whole estate of the bankrupt as then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding, and showing what debts or claims are yet undetermined, and what sum remains in his hands. The majority in value of the creditors present shall determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors ; but unless at least one-half in value of the creditors attend the meeting, either in person or by attorney, it shall be the duty of the assignee so to determine.

SEC. 5093.—Like proceedings shall be had at the expiration of the next three months, or earlier, if practicable, and a third meeting of creditors shall then be called by the court, and a final dividend then declared, unless any suit at law or in equity is pending, or unless some other estate or effects of the debtor afterward come to the hands of the assignee, in which case the assignee shall, as soon as may be, convert such estate or effects into money, and within two months after the same shall be so converted, they shall be divided in manner aforesaid. Further dividends shall be made in like manner as often as occasion requires ; and after the third meeting of creditors no further meeting shall be called, unless ordered by the court.

SEC. 5094.—The assignee shall give such notice to all

and he may, of course, indorse all bills and notes which he holds with authority to indorse as agent or trustee for another. (c) But all bills of exchange and prom-

(c) *Gibson v. Carruthers*, 8 M. & W. 333.

known creditors, by mail or otherwise, of all meetings, after the first, as may be ordered by the court.

SEC. 5095.—Any creditor may act at all meetings by his duly constituted attorney the same as though personally present.

SEC. 5096.—Preparatory to the final dividend, the assignee shall submit his account to the court and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time to be specified in such notice, and at such time the court shall audit and pass the accounts of the assignee, and the assignee shall, if required by the court, be examined as to the truth of his account, and if it is found correct he shall thereby be discharged from all liability as assignee to any creditor of the bankrupt. The court shall thereupon order a dividend of the estate and effects, or of such part thereof as it sees fit, among such of the creditors as have proved their claims, in proportion to the respective amount of their debts.

SEC. 5097.—No dividend already declared shall be disturbed by reason of debts being subsequently proved; but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors, before any further payment is made to the latter.

SEC. 5098.—If, by accident, mistake, or other cause, without fault of the assignee, either or both of the second and third meetings should not be held within the times limited, the court may, upon motion of an interested party, order such meetings, with like effect as to the validity of the proceedings as if the meeting had been duly held.

SEC. 5099.—The assignee shall be allowed, and may retain out of money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court.

SEC. 5100.—In addition to all expenses necessarily incurred by him in the execution of his trust, in any case, the assignee shall be entitled to an allowance for his services in such case on all moneys received and paid out by him therein, for any sum not exceeding one thousand dollars, five per centum

issory notes, holden bona fide by the bankrupt or insolvent for a valuable consideration, and in which he is beneficially interested, vest in the trustees, and may thereon; for any larger sum, not exceeding five thousand dollars, two and a half per centum on the excess over one thousand dollars; and for any larger sum, one per centum on the excess over five thousand dollars. If, at any time, there is not in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him.

SEC. 5101.—In the order for a dividend, the following claims shall be entitled to priority, and to be first paid in full, in the following order:

First. The fees, costs, and expenses of suits, and of the several proceedings in bankruptcy under this Title, and for the custody of property, as herein provided.

Second. All debts due to the United States, and all taxes and assessments under the laws thereof.

Third. All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws thereof.

Fourth. Wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

Fifth. All debts due to any persons who, by the laws of the United States, are, or may be, entitled to a priority, in like manner as if the provisions of this Title had not been adopted. But nothing contained in this Title shall interfere with the assessment and collection of taxes by the authority of the United States, or any State.

SEC. 5102.—Whenever a dividend is ordered, the register shall, within ten days after the meeting, prepare a list of creditors entitled to dividend, and shall calculate and set opposite to the name of each creditor who has proved his claim the dividend to which he is entitled out of the net proceeds of the estate set apart for dividend, and shall forward by mail, to every creditor a statement of the dividend to which he is entitled, and such creditor shall be paid by the assignee in such manner as the court may direct.

SEC. 5103.—If at the first meeting of creditors, or at any meeting of creditors, specially called for that purpose, and of which previous notice shall have been given for such length

be put in suit by them in their own names. (*d*) Where there are two separate causes of action totally distinct from each other, although arising upon one

(*d*) *Willis v. Freeman*, 12 East, 656.

of time and in such manner as the court may direct, three-fourths in value of the creditors whose claims have been proved shall resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt shall be settled by trustees, under the inspection and direction of a committee of the creditors, the creditors may certify and report such resolution to the court, and may nominate one or more trustees to take and hold and distribute the estate, under the direction of such committee. If it appears, after hearing the bankrupt and such creditors as desire to be heard, that the resolution was duly passed, and that the interests of the creditors will be promoted thereby, the court shall confirm it; and upon the execution and filing, by or on behalf of three-fourths in value of all the creditors whose claims have been proved, of a consent that the estate of the bankrupt shall be wound up and settled by trustees according to the terms of such resolution, the bankrupt, or his assignee in bankruptcy, if an assignee has been appointed, the assignee shall, under the direction of the court, and under oath, convey, transfer, and deliver all the property and estate of the bankrupt to the trustees, who shall, upon such conveyance and transfer, have and hold the same in the same manner, and with the same powers and rights, in all respects as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done had such resolution not been passed. Such consent and the proceedings under it shall be as binding in all respects on any creditor whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it. The court, by order, shall direct all acts and things needful to be done to carry into effect such resolution of the creditors, and the trustees shall proceed to wind up and settle the estate under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors; and the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy; and the trustees shall have all the rights and powers of assignees in bankruptcy. The court, on the application of such trustees, shall have power to summon and examine, on

and the same instrument and the bankrupt has no beneficial interest in one, the cause of action in which he has a beneficial interest will pass to the trustees while the other will not. (e)

(e) *Boddington v. Castelli*, 23 L. J., Q. B. 33.

oath or otherwise, the bankrupt or any creditor, or any person indebted to the estate, or known or suspected of having any of the estate in his possession, or any other person whose examination may be material or necessary to aid the trustees in the execution of their trust, and to compel the attendance of such persons and the production of books and papers in the same manner as in other proceedings in bankruptcy; and the bankrupt shall have the like right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustees as if such resolution had not been passed, and as if all the proceedings had continued in the manner provided in the preceding sections of this Title. If the resolution is not duly reported, or the consent of the creditors is not duly filed, or if, upon its filing, the court does not think fit to approve thereof, the bankruptcy shall proceed as if no resolution had been passed, and the court may make all necessary orders for resuming the proceedings. And the period of time which shall have elapsed between the date of the resolution and the date of the order for resuming proceedings shall not be reckoned in calculating periods of time prescribed by this Title.

SEC. 5103 A (June 22, 1874, § 17).—That in all cases of bankruptcy now pending, or to be hereafter pending, by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting called under the direction of the court and upon not less than ten days' notice to each known creditor of the time, place, and purpose of such meeting, such notice to be personal or otherwise, as the court may direct, resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor. And such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting, either in person or by proxy, and shall be confirmed by the signatures thereto of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor. And in calculating a majority for the purposes of a composition under

473. *Money in the hands of a bankrupt, clothed with a specific trust, does not pass to the trustees.* If, therefore, money has been advanced to a bankrupt this section, creditors whose debts amount to sums not exceeding fifty dollars shall be reckoned in the majority in value, but not in the majority in number; and the value of the debts of secured creditors above the amount of such security, to be determined by the court, shall, as nearly as circumstances admit, be estimated in the same way. And creditors whose debts are fully secured shall not be entitled to vote upon or to sign such resolution without first relinquishing such security for the benefit of the estate.

The debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the same, and shall answer any inquiries made of him; and he, or, if he is so prevented from being at such meeting, some one in his behalf, shall produce to the meeting a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due.

Such resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the court; and the court shall, upon notice to all the creditors of the debtor of not less than five days, and upon hearing, inquire whether such resolution has been passed in the manner directed by this section; and if satisfied that it has been so passed, it shall, subject to the provisions hereinafter contained, and upon being satisfied that the same is for the best interest of all concerned, cause such resolution to be recorded and statement of assets and debts to be filed; and until such record and filing shall have taken place, such resolution shall be of no validity. And any creditor of the debtor may inspect such record and statement at all reasonable times.

The creditors may, by resolution passed in the manner and under the circumstances aforesaid, add to, or vary the provisions of, any composition previously accepted by them, without prejudice to any persons taking interests under such provisions who do not assent to such addition or variation. And any such additional resolution shall be presented to the court in the same manner and proceeded with in the same way and with the same consequences as the resolution by which the composition was accepted in the first instance. The provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amounts of the debts

to be applied to a special purpose, and to be returned if the purpose cannot be accomplished, that money does not vest in the trustees, if it has been kept due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors.

Where a debt arises on a bill of exchange or promissory note, if the debtor shall be ignorant of the holder of any such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor and of the person to whom it is payable, and any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description by the debtor in respect to such debt.

Any mistake made inadvertently by a debtor in the statement of his debts, may be corrected upon reasonable notice and with the consent of a general meeting of his creditors.

Every such composition shall, subject to priorities declared in said act, provide for a pro rata payment or satisfaction, in money, to the creditors of such debtor, in proportion to the amount of their unsecured debts, or their debts in respect to which any such security shall have been duly surrendered and given up.

The provisions of any composition made in pursuance of this section may be enforced by the court, on motion made in a summary manner by any person interested, and on reasonable notice; and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court. Rules and regulations of court may be made in relation to proceedings of composition herein provided for in the same manner and to the same extent as now provided by law in relation to proceedings in bankruptcy.

If it shall at any time appear to the court, on notice, satisfactory evidence, and hearing, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may refuse to accept and confirm such composition, or may set the same aside; and, in either case, the debtor shall be proceeded with as a bankrupt in conformity with the provisions of law, and proceedings may be had accordingly; and the time during which such composition shall have been in force shall not, in such

separate and apart from the moneys of the bankrupt, and has not been used by him so as to make him a borrower of the money for his own use. (f)

(f) *Toovey v. Milne*, 2 B. & Ald. 683. *Edwards v. Glyn*, 28 L. J., Q. B. 359.

case, be computed in calculating periods of time prescribed by said act.

SEC. 5104.—The bankrupt shall at all times, until his discharge, be subject to the order of the court, and shall, at the expense of the estate, execute all proper writings and instruments, and do all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated. For neglect or refusal to obey any order of the court, the bankrupt may be committed and punished as for a contempt of court. If the bankrupt is without the district, and unable to return and personally attend at any of the times or do any of the acts which may be required pursuant to this section, and if it appears that such absence was not caused by willful default, and if, as soon as may be after the removal of such impediment, he offers to attend and submit to the order of the court, in all respects, he shall be permitted so to do, with like effect as if he had not been in default.

SEC. 5105.—No creditor proving his debt or claim, shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him, and all proceedings already commenced or unsatisfied judgments already obtained thereon against the bankrupt shall be deemed to be discharged and surrendered thereby. (Act of June 22, 1874, § 7.) But a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt where a discharge has been refused or the proceedings have been determined without a discharge.

SEC. 5106.—No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the

474. *Property of which the bankrupt was reputed owner.*—By the bankruptcy act, 1869, s. 15, pl. (5), all goods and chattels being, at the commencement of court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed.

SEC. 5107.—No bankrupt shall be liable during the pendency of the proceedings in bankruptcy to arrest in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him.

SEC. 5108.—At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts.

SEC. 5109.—Upon application for a discharge being made, the court shall order notice to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors shall reside, to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt.

SEC. 5110.—No discharge shall be granted, or, if granted, shall be valid in any of the following cases—

First. If the bankrupt has willfully sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact.

Second. If the bankrupt has concealed any part of his estate or effects, or any books or writings relating thereto; or has been guilty of any fraud or negligence in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this title, or if he has caused, permitted, or suffered any loss, waste, or destruction thereof.

Third. If, within four months before the commencement of such proceedings, the bankrupt has procured his lands, goods, money, or chattels, to be attached, sequestered, or seized on execution.

the bankruptcy, in the possession, order, or disposition of the bankrupt, being a trader, by the consent and permission of the true owner, of which goods and

Fourth. If, at any time after the second day of March, eighteen hundred and sixty-seven, the bankrupt has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities, or has made or been privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors; or has removed or caused to be removed any part of his property from the district, with intent to defraud his creditors.

Fifth. If the bankrupt has given any fraudulent preference contrary to the provisions of the act of March two, eighteen hundred and sixty-seven, to establish a uniform system of bankruptcy, or to the provisions of this Title, or has made any fraudulent payment, gift, transfer, conveyance, or assignment, of any part of his property, or has lost any part thereof in gaming, or has admitted a false or fictitious debt against his estate.

Sixth. If the bankrupt, having knowledge that any person has proved such false or fictitious debt, has not disclosed the same to his assignee within one month after such knowledge.

Seventh. If the bankrupt, being a merchant or tradesman, has not, at all times after the second day of March, eighteen hundred and sixty-seven, kept proper books of account.

Eighth. If the bankrupt, or any person in his behalf, has procured the assent of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings, by any pecuniary consideration or obligation.

Ninth. If the bankrupt has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment, or conveyance, of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed in satisfaction of his debts.

Tenth. If the bankrupt has been convicted of any misdemeanor under this Title.

SEC. 5111.—Any creditor opposing the discharge of any bankrupt may file a specification, in writing, of the grounds of his opposition, and the court may, in its discretion, order any question of fact so presented to be tried at a stated session of the district court.

SEC. 5112 (June 22, 1874, § 9).—That in cases of compul-

chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner, are property divisible among the creditors, and sory or involuntary bankruptcy, the provisions of said act, and any amendment thereof, or of any supplement thereto, requiring the payment of any proportion of the debts of the bankrupt, or the assent of any portion of his creditors, as a condition of his discharge from his debts, shall not apply; but he may, if otherwise entitled thereto, be discharged by the court in the same manner and with the same effect as if he had paid such per centum of his debts, or as if the required proportion of his creditors had assented thereto. And in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number, and one-third in value.

SEC. 5113.—Before any discharge is granted, the bankrupt must take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified as a ground for withholding such discharge, or as invalidating such discharge if granted.

SEC. 5114.—If it shall appear to the court that the bankrupt has in all things conformed to his duty under this Title, and that he is entitled, under the provisions thereof, to receive a discharge, the court shall grant him a discharge from all his debts except as hereinafter provided, and shall give him a certificate thereof under the seal of the court.

SEC. 5115.—The certificate of a discharge in bankruptcy shall be in substance in the following form:

District Court of the United States, District of _____
 Whereas _____ has been duly adjudged a bankrupt under the Revised Statutes of the United States, Title "Bankruptcy," and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said _____ be forever discharged from all debts and claims which by said Title are made provable against his estate, and which existed on the _____ day of _____, on which day the petition for adjudication was filed by (or against) him; excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy
 Given under my hand and the seal of the court at _____, in the said district, this _____ day of _____,
 (Seal.) _____, Judge.

may be sold accordingly; (*g*) but things in action, other than debts due to him in the course of his trade or business, are not to be deemed goods and chattels

(*g*) Sect. 25

SEC. 5116.—No person who has been discharged, and afterwards becomes bankrupt on his own application, shall be again entitled to a discharge whose estate is insufficient to pay seventy per centum of the debts proved against it, unless the assent, in writing, of three-fourths in value of his creditors who have proved their claims is filed at or before the time of application for discharge; but a bankrupt who proves, to the satisfaction of the court, that he has paid all the debts owing by him at the time of any previous bankruptcy, or who has been voluntarily released therefrom by his creditors, shall be entitled to a discharge in the same manner and with the same effect as if he had not previously been bankrupt.

SEC. 5117.—No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt.

SEC. 5118.—No discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise.

SEC. 5119.—A discharge in bankruptcy duly granted shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy. It may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting a full copy of the same forth in its terms as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands. The certificate shall be conclusive evidence in favor of such bankrupt of the fact and regularity of such discharge.

SEC. 5120.—Any creditor of a bankrupt, whose debt was proved or provable against the estate in bankruptcy, who desires to contest the validity of the discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to annul the same. The application shall be in writing, and shall

within the meaning of that clause. This does not extend to any articles left in the hands of a bankrupt, to be dealt with by him in the way of his trade, such as specify which, in particular, of the several acts mentioned in section fifty-one hundred and ten is intended to prove against the bankrupt, and set forth the grounds of avoidance; and no evidence shall be admitted as to any other of such acts; but the application shall be subject to amendment at the discretion of the court. The court shall cause reasonable notice of the application to be given to the bankrupt, and order him to appear and answer the same, within such time as to the court shall seem proper. If, upon the hearing of the parties, the court finds that the fraudulent acts, or any of them set forth by the creditor against the bankrupt, are proved, and that the creditor had no knowledge of the same until after the granting of the discharge, judgment shall be given in favor of the creditor, and the discharge of the bankrupt shall be annulled. But if the court finds that the fraudulent acts and all of them so set forth are not proved, or that they were known to the creditor before the granting of the discharge, judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by the proceedings.

SEC. 5121.—Where two or more persons who are partners in trade are adjudged bankrupt, either on the petition of such partners, or of any one of them, or on the petition of any creditor of the partners, a warrant shall issue, in the manner provided by this Title, upon which all the joint stock and property of the co-partnership, and also all the separate estate of each of the partners shall be taken, excepting such parts thereof as are hereinbefore excepted. All the creditors of the company, and the separate creditors of each partner, may prove their respective debts. The assignee shall be chosen by the creditors of the company. He shall keep separate accounts of the joint stock or property of the co-partnership, and of the separate estate of each member thereof, and after deducting out of the whole amount received by the assignee, the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors. If there is any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there is any balance of the joint stock after

books left in the hands of a bookseller to be sold by him, (*h*) or property left in the hands of a shipbuilder, carriagemaker, or other manufacturer, to be completed by him in the exercise of his trade. (*i*)

(*h*) *Whitfield v. Brand*, 16 M. & W.
282.

(*i*) *Holderness v. Rankin*, 29 L. J.,
Ch. 753.

payment of the joint debts, such balance shall be appropriated to and divided among the separate estates of the several partners according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts. The certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone. In all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone. If such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case.

SEC. 5122.—The provisions of this title shall apply to all moneys, business or commercial corporations and joint stock companies, and upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or upon the petition of any creditor of such corporation or company, made and presented in the manner provided in respect to debtors, the like proceedings shall be had and taken as are provided in the case of debtors. All the provisions of this title which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner, and with like force, effect, and penalties, apply to each and every officer of such corporations or company in relation to the same matters concerning the corporation or company, and the money and property thereof. All payments, conveyances, and assignments declared fraudulent and void by this title when made by a debtor shall in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. Whenever any corporation by proceedings under this title is declared bankrupt, all its property

475. Sale of the bankrupt's book-debts, good-will, &c.—By s. 25 of the bankruptcy act of 1869, the trustees are authorized to sell the book-debts of the bankrupt and assets shall be distributed to the creditors of such corporation in the manner provided in this title in respect to natural persons. But no allowance or discharge shall be granted to any corporation or joint stock company, or to any person or officer or member thereof.

SEC. 5123.—Whenever a corporation created by the laws of any state, whose business is carried on wholly within the state creating the same, and also any insurance company so created, whether all its business shall be carried on in such state or not, has had proceedings duly commenced against such corporation or company before the courts of such state for the purpose of winding up the affairs of such corporation or company and dividing its assets ratably among its creditors and lawfully among those entitled thereto, prior to proceedings having been commenced against such corporation or company under the bankrupt laws of the United States, any order made, or that shall be made, by such court agreeably to the state law for the ratable distribution or payment of any dividend of assets to the creditors of such corporation or company while such state court shall remain actually or constructively in possession or control of the assets of such corporation or company, shall be deemed valid notwithstanding proceedings in bankruptcy may have been commenced and be pending against such corporation or company.

5124.—In each case there shall be allowed and paid, in addition to the fees of the clerk of the court as now established by law, or as may be established by general order for fees in bankruptcy, the following fees, which shall be applied to paying for the services of the registers:

First. For issuing every warrant, two dollars.

Second. For each day in which a meeting is held, three dollars.

Third. For each order for a dividend, three dollars.

Fourth. For every order substituting an arrangement by trust deed for bankruptcy, two dollars.

Fifth. For every bond with surities, two dollars.

Sixth. For every application for any meeting in any matter under this act, one dollar.

Seventh. For every day's service while actually employed under a special order of the court, a sum not exceeding five dollars, to be allowed by the court.

rupt and the good-will of his business; and the purchaser has, by virtue of the assignment, power to sue in his own name for the debts assigned to him. (*k*)

(*k*) Sect. 111.

Eighth. For taking depositions, the fees now allowed by law.

Ninth. For every discharge when there is no opposition, two dollars.

Such fees shall have priority of payment, over all other claims out of the estate, and, before a warrant issues, the petitioner shall deposit with the clerk of the court fifty dollars as security for the payment thereof; and if there are not sufficient assets for the payment of the fees, the person upon whose petition the warrant is issued shall pay the same, and the court may issue an execution against him to compel payment to the register.

SEC. 5125.—The traveling and incidental expenses of the register, and of any clerk or other officer attending him, shall be settled by the court in accordance with the rules prescribed by the justices of the Supreme Court, and paid out of the assets of the estate in respect of which such register has acted; or if there are no such assets, or if the assets are insufficient, such expenses shall form a part of the costs in the case in which the register acts, to be apportioned by the judge.

SEC. 5126.—Before any dividend is ordered, the assignee shall pay out of the estate to the messenger the following fees, and no more:

First. For service of warrant, two dollars.

Second. For all necessary travel, at the rate of five cents a mile each way.

Third. For each written note to creditor named in the schedule, ten cents.

Fourth. For custody of property, publication of notices, and other services, his actual and necessary expenses upon returning the same in specific items, and making oath that they have been actually incurred and paid by him, and are just and reasonable, the same to be taxed or adjusted by the court, and the oath of the messenger shall not be conclusive as to the necessity of such expenses.

For cause shown, and upon hearing thereon, such further allowance may be made as the court, in its discretion, may determine.

SEC. 5127.—The enumeration of the foregoing fees shall

This section does not authorize the sale of the books of a bankrupt solicitor. (1) The book-debts referred to in the section are such debts accruing in the ordi-

(1) *Ex parte Roberts in re Holder*, 33 L. J., Bk. 8.

not prevent the justices of the Supreme Court from prescribing a tariff of fees for all other services of the officers of courts of bankruptcy, or from reducing the fees prescribed in the three preceding sections, in classes of cases to be named in their general orders.

SEC. 5127 A (June 22, 1874, § 18).—That from and after the passage of this act, the fees, commissions, charges, and allowances, excepting actual and necessary disbursements of and to be made by the officers, agents, marshals, messengers, assignees, and registers in cases of bankruptcy, shall be reduced to one-half of the fees, commissions, charges, and allowances heretofore provided for or made in like cases: Provided, That the preceding provision shall be and remain in force until the justices of the Supreme Court of the United States shall make and promulgate new rules and regulations in respect to the matters aforesaid, under the powers conferred upon them by sections four thousand nine hundred and ninety [ten] and five thousand one hundred and twenty-seven [forty-seven] of said act, and no longer, which duties they shall perform as soon as may be.

SEC. 5127 B (June 22, 1874, § 19).—That it shall be the duty of the marshal of each district, in the month of July of each year, to report to the clerk of the district court of such district, in a tabular form, to be prescribed by the justices of the Supreme Court of the United States, as well as such other or further information as may be required by said justices.

First. The number of cases in bankruptcy in which the warrant prescribed in section five thousand and nineteen [eleven] of said act has come to his hands during the year ending June thirtieth, preceding.

Second. How many such warrants were returned, with the fees, costs, expenses, and emoluments thereof, respectively and separately.

Third. The total amount of all other fees, costs, expenses, and emoluments, respectively and separately earned or received by him during such year, from or in respect of any matter in bankruptcy.

Fourth. A summarized statement of such fees, costs, and

nary course of a man's trade as are usually entered in the trade books. (*m*)

476. *Transfer to the trustees of contracts in which*

(*m*) *Shipley v. Marshall*, 14 C. B. N. S. 566 ; 32 L. J., C. P. 258.

emoluments, exclusive of actual disbursements in bankruptcy, received or earned for such year.

Fifth. A summarized statement of all actual disbursements in such cases for such year.

And in like manner, every register shall, in the same month and for the same year, make a report to such clerk of,

First. The number of voluntary cases of bankruptcy coming before him during said year.

Second. The amount of assets and liabilities, as nearly as may be, of the bankrupts.

Third. The amount and rate per centum of all dividends declared.

Fourth. The disposition of all such cases.

Fifth. The number of compulsory cases in bankruptcy coming before him in the same way.

Sixth. The amount of assets and liabilities, as nearly as may be, of such bankrupts.

Seventh. The disposition of all such cases.

Eighth. The amounts and rate per centum of all dividends declared in such cases.

Ninth. The total amount of fees, charges, costs, and emoluments of every sort, received or earned by such register during said year in each class of cases above stated.

And in like manner, every assignee shall, during said month, make like return to such clerk of,

First. The number of voluntary and compulsory cases, respectively and separately, in his charge during said year.

Second. The amount of assets and liabilities therein, respectively and separately.

Third. The total receipts and disbursements therein, respectively and separately.

Fourth. The amount of dividends paid or declared, and the rate per centum thereof in each class, respectively and separately.

Fifth. The total amounts of all his fees, charges and emoluments, of every kind therein, earned or received.

Sixth. The total amount of expenses incurred by him for legal proceedings and counsel fees.

Seventh. The disposition of the cases respectively.

the bankrupt is interested in right of his wife.—The bankrupt's disposable interest in his wife's property, not settled upon the wife for her separate use, passes,

Eighth. A summarized statement of both classes as aforesaid.

And in like manner the clerk of said court, in the month of August in each year, shall make up a statement for such year, ending June thirtieth, of,

First. All cases in bankruptcy pending at the beginning of the said year.

Second. All of such cases disposed of.

Third. All dividends declared therein.

Fourth. The number of reports made from each assignee therein.

Fifth. The disposition of all such cases.

Sixth. The number of assignees' accounts filed and settled.

Seventh. Whether any marshal, register, or assignee has failed to make and file with such clerk the reports by this act required, and if any have failed to make such reports, their respective names and residences.

And such clerk shall report in respect of all cases begun during said year.

And he shall make a classified statement, in tabular form, of all his fees, charges, costs, and emoluments, respectively, earned or accrued during said year, giving each head under which the same accrued, and also the sum of all moneys paid into and disbursed out of court in bankruptcy, and the balance in hand or on deposit.

And all the statements and reports herein required shall be under oath, and signed by the persons respectively making the same.

And said clerk shall, in said month of August, transmit every such statement and report so filed with him, together with his own statement and report aforesaid, to the attorney-general of the United States.

Any person who shall violate the provisions of this section shall, on motion made, under the direction of the attorney-general, be by the district court dismissed from his office, and shall be deemed guilty of a misdemeanor, and, on conviction thereof, be punished by a fine of not more than five hundred dollars, or by imprisonment not exceeding one year.

SEC. 5128. —If any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the

together with the property which the bankrupt or insolvent possesses in his own right, to the trustees, who thus become entitled to the rents and profits of all the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and (act of June 22, 1874, § 11) knowing that such attachment (act of June 22, 1874, § 11), sequestration, seizure, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this Title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited (act of June 22, 1874, § 11). And nothing in said section five thousand one hundred and twenty-eight [thirty-five] shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith, upon a security taken in good faith on the occasion of the making of such loan.

SEC. 5129.—If any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and (act of June 22, 1874, § 11) knowing that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this title, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt.

SEC. 5130.—The fact that such a payment, pledge, sale, assignment, transfer, conveyance, or other disposition of a debtor's property as is described in the two preceding sections is not made in the usual and ordinary course of business of the debtor shall be *prima facie* evidence of fraud.

real estate of which the husband is seized in right of his wife, and which have not been vested in trustees for her sole exclusive use, and to the benefit of all

SEC. 5130 A (June 22, 1874, § 10).—That in cases of involuntary or compulsory bankruptcy, the period of four months mentioned in section five thousand one hundred and twenty-eight [thirty-five] of the act to which this is an amendment, is hereby changed to two months, but this provision shall not take effect until two months after the passage of this act, and in the cases aforesaid, the period of six months mentioned in said section five thousand one hundred and twenty-nine [thirty-five] is hereby changed to three months, but this provision shall not take effect until three months after the passage of this act.

SEC. 5131.—Any contract, covenant, or security made or given by a bankrupt or other person with, or in trust for, any creditor, for securing the payment of any money as a consideration for or with intent to induce the creditor to forbear opposing the application for discharge of the bankrupt, shall be void; and any creditor who obtains any sum of money or other goods, chattels, or security, from any person as an inducement for forbearing to oppose, or consenting to such application for discharge, shall forfeit all right to any share or dividend in the estate of the bankrupt, and shall also forfeit double the value or amount of such money, goods, chattels, or security so obtained, to be recovered by the assignee for the benefit of the estate.

SEC. 5132.—Every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or upon that of a creditor:

First. Who secretes or conceals any property belonging to his estate; or,

Second. Who parts with, conceals, destroys, alters, mutilates, or falsifies, or causes to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto; or,

Third. Who removes, or causes to be removed, any such property or book, deed, document, or writing out of the district, or otherwise disposes of any part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay him in recovering or receiving the same; or,

Fourth. Who makes any payment, gift, sale, assignment,

covenants annexed to such estates, and all contracts relating to the same. (n) The trustees will take the rights of the husband over the choses in action of the

(n) *Doe v. Steward*, 1 Ad. & E. 311.

transfer, or conveyance of any property belonging to his estate with the like intent; or,

Fifth. Who spends any property belonging to his estate in gaming; or,

Sixth. Who, with intent to defraud, willfully and fraudulently conceals from his assignee, or omits from his inventory, any property or effects required by this title to be described therein; or,

Seventh. Who, having reason to suspect that any other person has proved a false or fictitious debt against his estate, fails to disclose the same to his assignee within one month after coming to the knowledge or belief thereof; or,

Eighth. Who attempts to account for any of his property by fictitious losses or expenses; or,

Ninth. Who, within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud; or,

Tenth. Who, within three months next before the commencement of proceedings in bankruptcy, with intent to defraud his creditors, pawns, pledges, or disposes of, otherwise than by transactions made in good faith in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for,

Shall be punishable by imprisonment, with or without hard labor, for not more than three years.

SEC. 563.—Eighteenth. . . . The district courts are constituted courts of bankruptcy, and shall have in their respective districts original jurisdiction in all matters and proceedings in bankruptcy.

SEC. 566.—The trial of issues of fact in the district court, in all causes except in cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury.

SEC. 648.—The trial of issues of fact in the circuit courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy. . . .

wife in the same plight and condition as the husband himself had them, (o) and must bring a joint action in their own names and in that of the wife for the purpose of reducing her chose in action in possession, and must recover judgment and take out execution in such joint action before the death of the husband, to make good their title against the wife, in case she should survive him. (p) The trustees cannot sue alone on promissory note not negotiable, given to the wife before marriage; (q) and, if the wife before her marriage has assigned to a trustee a chose in action for the benefit of herself, the right to sue on that chose in action cannot pass to the trustees of the bankrupt husband. (r)

477. *Transfer to the trustees of the bankrupt's interest in a partnership.*—If one of several partners is adjudged bankrupt, his interest in the partnership contracts and transactions entered into before the bankruptcy passes to the trustees. (s) Where a member of a partnership is adjudged bankrupt, the court may authorize the trustee, with consent of the creditors, certified by a special resolution, to commence and prosecute any action or suit in the names of the trustees and of the bankrupt's partner; and any release by such partner of the debt or demand to which the action or suit relates will be void; but notice of the

(o) *Ex parte Coysegame*, 1 Atk. 192.

(p) *Mitford v. Mitford*, 9 Ves. 99. *Pierce v. Thornley*, 2 Sim. 177. *Purdew v. Jackson*, 1 Russ. 26. *Honner v. Morton*, 3 Russ. 68.

(q) *Sherrington v. Yates*, 12 M. & W. 864.

(r) *Parnham v. Hurst*, 8 M. & W. 750.

(s) *Eckhardt v. Wilson*, 8 T. R. 142.

SEC. 711.—The jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states. . . .

Sixth. Of all matters and proceedings in bankruptcy.

application for authority to commence the action or suit must be given to such partner, and he may show cause against it, and on his application the court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the action or suit, and if he does not claim any benefit therefrom, he is to be indemnified against costs in respect thereof, as the court directs. (t) If one of two joint owners of goods becomes bankrupt, the solvent joint owner may authorize a sale of the goods, and the broker who sells by his directions is not responsible in an action by the trustees for the proceeds of the sale. (u) The trustees of a firm in partnership, being trustees of the entire estate of each partner, as well as trustees of the property of the whole firm, may in the same action recover debts due to all the partners jointly, and the separate debts to each partner individually; for the money, when recovered, all goes to the same fund, to be divided among the creditors. (x)

478. *Contracts made with the bankrupt during the bankruptcy.*—The trustees also are entitled to sue, if they think fit, upon all contracts entered into with the bankrupt during the bankruptcy, not being contracts for the personal labor and services of the bankrupt made for the earning of his necessary subsistence. If the bankrupt or his servants have sold goods, after the bankruptcy, to parties who bought with notice of the bankruptcy, the trustees may treat the bankrupt as their agent, and sue such purchasers for the price, or they may treat the purchasers as wrong-doers, and bring an action for the goods. An application by the trustees to the purchasers for payment of the price,

(t) Bankruptcy Act, 1869, s. 105.

(x) *Graham v. Mulcaster*, 12 Sc.

(u) *Morgan v. Marquis*, 22 L. J., 327.

Ex. 21.

treating the transaction as a contract for sale, amounts only to a conditional adoption of the contract, and is dependent upon the demand of payment being acceded to. If payment is not made, the trustees may repudiate the sale altogether. (y) Upon a contract which has been entered into before the bankruptcy, but which has not been finally completed until after the bankruptcy, the trustees alone are entitled to sue. (z) And, with regard to all contracts made by the bankrupt before he obtains his certificate, the trustees may, if they please, adopt such contracts, treating the bankrupt as their agent in the transaction. They may enforce payment of a bill of exchange, or negotiable security, made payable to the bankrupt after the bankruptcy. (a) They may claim the fruits of his trading, or of his carrying on business as a general medical practitioner, the proceeds of his inventions and discoveries, and the profits of his patent rights. (b) If the bankrupt has bestowed his work and labor and skill upon materials provided by the trustees, they are entitled to the benefit of such work and labor in common with the materials upon which it has been employed; and, if he has entered into an executory contract for the sale of goods, the trustees may affirm this contract, and treating the bankrupt as their agent in the matter, may bring an action for the price. (c) If, however, the trustees permit an undischarged bankrupt to pay away for value money which he has received since the adjudication, which they could have required to be paid to them, they cannot follow it

(y) *Valpy v. Sanders*, 17 L. J., C. P. 249.

(z) *Hillary v. Morris*, 5 C. & P. 6.

(a) *Kitchin v. Bartsch*, 7 East, 53

(b) *Crofton v. Poole*, 1 B. & Ad. 568. *Elliot v. Clayton*, 16 Q. B. 584. *Hesse v. Stevenson*, 3 B. & P. 578.

(c) *Whitmore v. Gilmour* 13 L. J., Ex. 201; 12 M. & W. 308. *Evans v. Mann*, 2 Cowp. 569.

even though the person to whom the money was paid had notice of the bankruptcy. (*d*)

479. *Rights of undischarged bankrupts.* — The bankrupt has a right to maintain actions upon contracts entered into with him after his bankruptcy, and before he has obtained his certificate, unless the trustees interfere to prevent him; he may sue for money lent, goods sold and delivered, and for work and labor done and materials provided by him, after he has been adjudged bankrupt, inasmuch as such after-acquired property does not vest absolutely in the assignees, although they have a right to claim it; if they do not make any claim, the bankrupt has a perfect right as against all other persons, and may maintain actions accordingly. (*e*) When, therefore, after the bankruptcy, the defendant made a promissory note payable to the bankrupt or his order, and the latter indorsed the note without the previous consent of the trustees, it was held, first, that, as against the defendant, and as against all the world excepting the trustees, the bankrupt was competent to make the indorsement; and, secondly, that, as the defendant, notwithstanding the bankruptcy, had made the note payable to the order of the bankrupt, he could not afterwards dispute the power of the latter to indorse it, and was therefore estopped from setting up the bankruptcy as an answer to the action. (*f*) The bankrupt is entitled also to the earnings of his own personal labor, without which it has been said he would be left to starve; (*g*) and it has consequently been held that, if the trustees themselves employ the bankrupt, and have the benefit of his personal labor under

(*d*) Ex parte Dewhirst, in re Van-
lohe, L. R., 7 Ch. 185.

(*e*) Webb v. Fox, 7 T. R. 391.

(*f*) Drayton v. Dale, 2 B. & C. 293

(*g*) Chippendale v. Tomlinson, 4
Doug. 318.

an agreement to pay him wages, he may maintain an action against them for the recovery thereof. (*h*) But he cannot acquire a right of property in anything beyond the produce of his daily labor reasonably necessary for his subsistence. If he works up materials, employs subordinate agents under him, or in any way amasses money, his proprietary rights in respect thereof may be at once annihilated by the intervention and claim of his trustees. The bankrupt may sue also, as we have already seen, upon all contracts in which he has a bare legal title as trustee.

480. *Liability of an undischarged bankrupt.*—

With respect to the status of an undischarged bankrupt after the close of the bankruptcy, it is enacted by the bankruptcy act, 1869, sect. 54, that where a person who has been made bankrupt has not obtained his discharge, then, from and after the close of his bankruptcy, the following consequences shall ensue:

1. No portion of a debt provable under the bankruptcy shall be enforced against the property of the person so made bankrupt until the expiration of three years from the close of the bankruptcy; and during that time, if he pay to his creditors such additional sum as will, with the dividend paid out of his property during the bankruptcy, make up ten shillings in the pound, he shall be entitled to an order of discharge in the same manner as if a dividend of ten shillings in the pound had originally been paid out of his property.

2. At the expiration of a period of three years from the close of the bankruptcy, if the debtor made bankrupt has not obtained an order of discharge, any balance remaining unpaid in respect of any debt

(*h*) *Coles v. Barrow*, 4 Taunt. 754.

proved in such bankruptcy (but without interest in the meantime) shall be deemed to be a subsisting debt in the nature of a judgment debt, and, subject to the rights of any persons who have become creditors of the debtor since the close of his bankruptcy, may be enforced against any property of the debtor with the sanction of the court which adjudicated such debtor a bankrupt, or of the court having jurisdiction in bankruptcy in the place where the property is situated, but to the extent only, and at the time and in the manner, directed by such court, and after giving such notice and doing such acts as may be prescribed in that behalf.

481. *Liability of the trustees upon the bankrupt's covenants and executory contracts.*—If the trustees elect to take the bankrupt's leases, and interests in land, they become chargeable upon the covenants annexed to such estates and running with the land. So, also, the trustees may elect to take the bankrupt's executory contracts, and will then be chargeable therewith. (i)

482. *Disclaimer by the trustee.*—When any property of the bankrupt, acquired by the trustee under the bankruptcy act, consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, the trustee, notwithstanding he has endeavored to sell or has taken possession of such property, or exercised any act of ownership in relation thereto, may, by writing under his hand, dis-

(i) *Gibson v. Carruthers*, 8 M. & W. 328. *Bowman v. Nash*, 9 B. & C. 145.

claim such property ; and upon the execution of such disclaimer, the property disclaimed will, if the same is a contract, be deemed to be determined from the date of the order of adjudication ; and, if the same is a lease, be deemed to have been surrendered on the same date ; and, if the same be shares in any company, be deemed to be forfeited from that date ; and if any other species of property, it will revert to the person entitled on the determination of the estate or interest of the bankrupt ; but, if there is no person in existence so entitled, then in no case will any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the court ; and the court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just. Any person injured by the disclaimer is to be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy. (*j*)

The trustee is not entitled to disclaim any property where an application in writing has been made to him by any person interested in such property, requiring such trustee to decide whether he will disclaim or not, and the trustee has for a period of not less than twenty-eight days after the receipt of such application, or such further time as may be allowed by the court, declined or neglected to give notice whether he disclaims the same or not. (*k*) The trustees cannot disclaim a leasehold interest without leave of the court. (*l*)

Where the owners of certain houses entered into

(*j*) Bankruptcy Act, 1869, s. 23.

(*k*) *Id.* s. 24.

(*l*) Rule 28 of the Rules of July 7th, 1871.

an agreement with H, to grant him a lease or the premises for ten years at an annual rent, and after the first year H filed a petition for liquidation by arrangement, and the trustee under the liquidation disclaimed the agreement, it was held that the lessors were entitled to prove as creditors for the injury they had sustained "by the operation of the section," and that the measure of the injury sustained was the difference between the rent to be paid under the agreement, and what they could obtain for the property at the time of the disclaimer. (*m*)

The word surrender in the twenty-third section is not to be taken in a strictly legal sense; and where an assignee of a lessee becomes bankrupt, and his trustee disclaims, that will not affect the rights and liabilities of the lessor and lessee inter se. (*n*)

483. *Effect of annulling the adjudication.*—Whenever any adjudication in bankruptcy is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the trustee or any person acting under his authority, or by the court, will be valid; but the property of the debtor, who was adjudged a bankrupt, will in such case vest in such person as the court may appoint, or in default of any such appointment revert to the bankrupt for all his estate or interest therein, upon such terms and subject to such conditions, if any, as the court may declare by order. (*o*) A copy of the order of the court, annulling the adjudication of a debtor as a bankrupt must be forthwith published in the "London Gazette,"

(*m*) *Ex parte Llynvi Coal & Iron Co., in re Hide*, L. R., 7 Ch. 28. 242. Per Martin and Piggott, B. B.; Bramwell, B. dissenting.

(*o*) See *Bailey v. Johnston*, L. R., 7 Ex. 263; 41 L. J., Ex. 211.

(*n*) *Smyth v. Worth*, L. R., 7 Ex.

and advertised locally in the prescribed manner; and the production of a copy of the "Gazette" containing such order will be conclusive evidence of the fact of the adjudication having been annulled, and of the terms of the order annulling the same. (*p*)

(*p*) Bankruptcy Act, 1869, s. 31

CHAPTER VI.

OF REMEDIES FOR BREACH OF CONTRACT.

SECTION I.

DAMAGES.

484. *Compensation in damages for breach of contract.*—Whenever one party to a contract has failed in performing what he has undertaken to do in favor of another contracting party, the latter is entitled to compensation in damages. All evidence tending to show what the damages really are is admissible; but the pecuniary consideration given for the contract is no criterion of the pecuniary damage resulting from the breach of it. (a) Damages may be recovered, although the plaintiffs are not entitled to the whole in their own right, and although the damages are divisible between the plaintiffs and other parties in certain unknown proportions; (b) but the right to recover is of course confined to the parties to the contract. (c)

485. *Nominal damages.*—Whenever a contract has been broken, and no particular or precise damage can be proved to have been sustained, and no evidence of actual damage can be given, nominal damages are

(a) *Brady v. Oastler*, 33 L. J., Ex. 300.

(c) *Winterbotham v. Wright*, 10 M. & W. 115.

(b) *Robertson v. Waite*, 8 Exch. 299.

recoverable as a matter of course. (*d*)¹ If, therefore on a breach of contract, the jury are unable to ascertain the amount of damages, but find a verdict for the defendant, the court will permit the plaintiff to enter a verdict for nominal damages. (*e*)² But a creditor who has received the full amount of a debt due to him in satisfaction and discharge of the debt, cannot sue for nominal damages in respect of the detention or non-payment of the money due. (*f*)

486. *General and special damages.*—In the case of a warranty of the health and soundness of cattle at the time of a sale thereof, the general damage resulting from the breach of warranty is the deterioration in the value of the cattle resulting from disease; special damage may arise, if the diseased cattle are mixed with other flocks, and communicate to them a contagious disorder. (*g*) In an action for the breach of a covenant to repair, the general damages are such a sum as it will cost to put the premises into repair. Special damages may arise and be recoverable, if the covenantee is himself only a lessee of the premises, holding them under a like covenant to repair, and has been sued by the original lessor, and compelled to pay damages and costs in consequence of the defendant's

(*d*) *Ashby v. White*, 2 Ld. Raym. 955. *Van Wart v. Woolley*, 1 M. & M. 520. *Marzetti v. Williams*, 1 B. & Ad. 424.

(*e*) *Feize v. Thompson*, 1 Taunt. 121.

(*f*) *Beaumont v. Greathead*, 2 C. B. 500.

(*g*) Poth. OBLIGATIONS, No. 166. Sedgwick on Damages, 96. And see *Mullett v. Mason*, L. R., 1 C. P. 559; 35 L. J., C. P. 299.

¹ *Stevens v. Lyford*, 7 N. H. 360; *Furlong v. Polleys*, 30 Me. 491; *Bedell v. Powell*, 13 Barb. 183; *Vanderslice v. Newton*, 4 Comst. 183.

² See *Webb v. Portland M'f'g Co.*, 3 Sumner, 189; *Paul v. Slason*, 22 Vt. 231; *Bruce v. Pettengill*, 12 N. H. 341; *Blot v. Boiceau*, 3 Comst. 78.

breach of covenant. (*h*) Similar rules and principles as to general and special damages prevail in the civil and continental law. (*i*) "If," observes Touillier, "an architect who has contracted to build a house for a tenant constructs it so ill, that the house falls, this may cause four sorts of loss; first, the expense of re-building; second, the loss of the rent that the proprietor would have received; third, the damage done to the tenant; fourthly, the loss of the furniture in the house; for all these the architect may be responsible; but he would not be liable for jewels or articles of extraordinary value." (*k*) In the case of contracts for the payment of a specified sum of money, the general damages are obviously the sum agreed to be paid, if the contract has been fully and properly performed by the plaintiff, and nothing has been paid on account. But, when the contract is not for the payment of a specific sum of money at an appointed time, but for the performance of some particular act, the plaintiff is entitled to a full and fair compensation for the injury and inconvenience resulting from the breach of contract; and the court will not tie a jury down to any nice calculation, but will leave them considerable latitude in assessing the damages. (*l*) It is not usual with the courts to grant a new trial on the ground that the damages are smaller than the court may think reasonable, unless the judge who tried the cause is dissatisfied with the smallness of the damages. (*m*) Where the damages recovered are under £20

(*h*) *Smith v. Howell*, 6 Exch. 737; 20 L. J., Ex. 377.

(*i*) Cod. Civ. liv. 3, tit. 3, ss. 1149-1151. Duranton, Cours de Droit, 10, No. 480, 481.

(*k*) Touillier, Droit Civ. liv. 3, tit. 3, ch. 3. vol. 6, p. 290.

(*l*) *Lowe v. Peers*, 2 Burr. 2225. *Loosemore v. Radford*, 9 M. & W. 657. *Sondes v. Fletcher*, 5 B. & Ald. 835.

(*m*) *Adams v. Mid. Ry. Co.* 31 L. J., Ex. 35. *Creed v. Fisher*, 9 Exch. 472.

the court will not grant a new trial unless the verdict is a "perverse verdict." (*n*)

Damages are recoverable only up to the time of the commencement of the action; but the prospective as well as the present injury sustained at the time the action was commenced may be regarded in determining what will be a fair compensation to be awarded to the plaintiff. (*o*)¹

487. *Recovery of interest generally.*—As regards the recovery of interest at common law, the general rule is, that interest is allowed only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances. In the case of bills of exchange and promissory notes, made payable with interest, the interest runs from the day of the date of the bill or note; if they are silent as to interest, it is payable only from the time when the bill or note becomes due. The interest forms part of the damages, and the jury may allow such a reasonable amount as they think proper. (*p*) When a bill or note is payable on demand, interest may be given from the issuing of the writ, if there has been no previous demand. (*q*) In the case of a bank stopping payment, the closing of the doors of the bank dispenses with the necessity of a formal demand of payment of the notes and drafts of the bank; and interest will run upon them from the time

(*n*) *Gibbs v. Tunaley*, 1 C. B. 641.

(*p*) *Roffey v. Greenwell*, 10 Ad. &

(*o*) Com. Dig. DAMAGES, D. Fetter E. 222.

v. Beal, 1 Raym. 339, 692.

(*q*) *Pierce v. Fothergill*, 2 Sc. 334.

¹ But see as to this rule, *Miller v. Mariners' Church*, 7 Greenl. 51; *Walker v. Ellis*, 1 Sneed. 515; *Davis v. Fish*, 1 Greene (Iowa), 406; *Dorwin v. Potter*, 5 Denio, 306; *Heaney v. Heaney*, 3 Id. 625; *Green v. Man*, 71 Ill. 613.

of the stoppage. (r) As against the drawer of a bill, interest runs only from the time of his receiving notice of dishonor. (s) If goods are sold, to be paid for by a bill, and the bill be not given, interest may be recovered on the price from the time when the bill would have become due. (t) If accounts between the parties show that interest has always been claimed and allowed on sums advanced or balances unpaid, there will be evidence from which a promise to pay interest may be implied. (u) And, if an express contract to pay interest is proved, the non-payment of it forms part of the damages. (x) If no rate of interest is specified on the face of a bill of exchange, the rate of interest recoverable by way of damages is the current rate of interest payable at the place where the contract was made. If, therefore, such a bill of exchange is drawn in one country, payable in another, the drawer is liable, on the dishonor of the bill, to pay interest according to the current rate of interest in the country where the bill was drawn. (y) Where a simple contract debt has been secured by deposit of title deeds, and nothing has been said as to interest, the mortgagee is entitled to interest at the rate of £4 per cent. (z)

By the 3 & 4, Will 4, c. 42, s. 28, it is enacted that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue or any inquisition or damages, may, if they think fit, allow interest to the creditor at a rate not exceeding the cur-

(r) *East of England Banking Co.*,
in re, L. R., 6 Eq. 368.

(s) *Walker v. Barnes*, 5 Taunt. 240.

(t) *Marshall v. Poole*, 13 East, 101.
Farn v. Ward, 3 M. & W. 25.

(u) *Bruce v. Hunter*, 3 Campb. 467.
Calton v. Bragg, 15 East, 227.

(x) *Allen v. Harrison*, 3 Moore,
30.

(y) *Gibbs v. Freemont*, 9 Exch. 31;
22 L. J., Ex. 302.

(z) *In re Kerr's Policy*, L. R., 8 Eq.
331.

rent rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument, at a certain time, or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment. And the jury may also (s. 29), if they think fit, give damages, in the nature of interest, over and above the sum recoverable, in all actions on policies of insurance made after the passing of the Act. By the 1 & 2 Vict. c. 110, s. 17, it is enacted that every judgment debt shall carry interest at the rate of £4 per cent. per annum from the time of entering up the judgment. (a) A written application for a loan till a day fixed is not an instrument by virtue of which money is payable within the 3 & 4 Will. 4, c. 42, s. 28, so as to enable a jury to give interest as damages, though the loan is made on the terms of the application. (b)¹

488. Of special damages.—The general rule is that all damages which are the fair and natural result

(a) *Newton v. Grand Junc., &c.*, 16 L. J., Ex. 276.

(b) *Taylor v. Holt*, 3 H. & C. 452. Sed quære.

¹ "In general, where the injury complained of consists in the non-payment of money, the amount unduly withheld, together with the interest on that amount, during the period of the withholding, makes up the whole compensation, because the law assumes that interest, or the money paid for the use of money, is the exact measure of the worth of money. This would be very nearly true, in fact, of the rate of interest actually paid in the market, if this were wholly unaffected by the usury laws. But the law assumes that the rate of interest which it allows is that which, on the whole, interest ought to be, and fixes the rates on that ground, and therefore assures, in every case, that this standard measures the use which the plaintiff might have made of his money."—*Parsons on Contracts*, iii. p. 214.

of the defendant's breach of contract, although arising out of special circumstances, may be recovered in the action brought against him, provided they must, in the ordinary course of things, have been expected to occur, and may fairly be considered to have been contemplated by the parties as the probable consequence of a breach of the contract. If the contract has been made under special circumstances which were communicated and known to both parties, the damages they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under those special circumstances so known and communicated; but, if the special circumstances were wholly unknown to the party breaking the contract, he can only be supposed to have had in his contemplation the amount of injury which would arise generally, and not from any special circumstances. (c) Thus, where a cable was sold with a warranty, and the cable on trial did not answer the warranty, and was broken and lost, and the purchaser, relying on the warranty, had attached an anchor to the cable, and lost consequently both his anchor and cable, it was decided that the value of the anchor might be recovered in addition to the price paid for the cable. (d) Where the defendant covenanted with the plaintiff that, if the plaintiff would surrender his lease, in order that a new lease might be granted to the defendant, the defendant would sink a pit on the land in search of coal, and, in case a marketable vein of coal should be reached, would pay the plaintiff £2,500, and the pit was never sunk, and the defendant was sued for a breach of his covenant, and it was shown that market-

(c) *Sully v. Duranty*, 3 H. & C. 270; 33 L. J., Ex. 319. *Burton v. Pinkerton*, L. R., 2 Ex. 340; 36 L. J., Ex. 137.

(d) *Borradaile v. Brunton*, 2 Moore, 582; 8 Taunt. 535.

able coal would probably have been found if the pit had been sunk, it was held that the whole £2,500 were recoverable. (e) Where the defendant, in consideration of £10 paid by the plaintiff, promised to let to the latter an iron-mill for the term of six months, and the plaintiff, relying on this promise, purchased and laid in a stock-in-trade, and the defendant then refused to let him the mill, and the jury, although £10 only had been paid by the plaintiff for the hire of the mill, and the mill was not worth more than £20 per annum to let out for hire, assessed the damages at £500, by reason of the plaintiff's loss in the purchase of his stock-in-trade, it was held that they were entitled so to do, and the court refused to interfere with their verdict. (f) Where the plaintiff, who was a large farmer, and was known by the defendant to be accustomed to thresh out his wheat in the field and send it off to market, gave an order to the defendant for a threshing machine, which was to be delivered on the 11th of August, at which time the wheat might reasonably be expected to be ripe, and the threshing machine was not ready, but was promised from time to time, and was not delivered before the middle of September, and it became necessary to stack the wheat out in the field, where it was damaged by a thunder-storm before it could be thatched, and had to be kiln-dried, it was held that the plaintiff was entitled to recover the damage he had sustained and the extra expense he had incurred, as the injury was such as might naturally be expected to result from the breach of contract, and ought to have been contemplated by the defendant as a probable consequence of failure on his part to send the machine at the time appointed.

(e) *Pell v. Shearman*, 10 Exch. 766.

(f) *Nurse v. Barnes*, T. Raym. 77.

(*g*) Where the defendants, a gas company, contracted to supply the plaintiff with a proper service-pipe from the main outside to a meter inside his premises, and the gas escaped from a defect in the pipe, and the servant of a gas-fitter, who happened to be working in an adjoining room, incautiously went into the shop with a lighted candle, and the escaped gas exploded, it was held that the defendants were liable for all the damage done. (*h*) Where, on the sale of a chattel, the buyer intends it for a special purpose, but the seller supposes it is for another and more obvious purpose, the buyer can recover, as damages for the non-delivery according to the contract, the loss of profit which might have been made from the purpose supposed by the seller, provided the buyer has actually sustained damages to that or a greater amount. (*i*) Where the defendant had been guilty of a breach of contract in not repairing a steamship within the time stipulated for, it was held that he was liable to pay as damages the net profits which the owners might have obtained by chartering the vessel, if she had been delivered at the time fixed by the contract. (*k*) Where, on the other hand, a miller delivered to a carrier the broken shaft of his mill to be carried for hire to an engineer, and the carrier negligently delayed the transmission and delivery of the shaft, and in consequence of the delay the mill was kept standing idle, and the miller brought an action for damages against the carrier, and sought to recover compensation for the loss

(*g*) *Smeed v. Foerd*, 1 Ell. & Ell. 602; 28 L. J., Q. B. 178. *Prior v. Wilson*, 35 Law T. R. 549; 8 W. R., Q. B. 260.

(*h*) *Burrows v. The March Gas & Coke Co.*, L. R., 2 Ex. 67; *Id.* 7 Ex. 96.

(*i*) *Cory v. Thames Ironwork Co.*, L. R., 3 Q. B. 181.

(*k*) *Trent & Humber Shipbuilding Co.*, in re, ex parte *The Cambrian Steam Packet Co.*, L. R., 6 Eq. 396; *Id.* 4 Ch. 113.

of the profits of his trade whilst the mill was stopped through the default of the carrier, it was held that, in order to recover these damages, the miller should have communicated to the carrier the fact that he had no other shaft, and that his mill was necessarily stopped until the new shaft was put up; for the stoppage of the mill could not reasonably be contemplated by the carrier as the necessary and natural result of delay in the delivery of the broken shaft. (l) And the same principle of law was adopted in a case where a cotton-mill came to a stand-still in consequence of delay by a carrier in delivering some cotton. (m) So, where a contract had been entered into between the plaintiff and the defendant for the furnishing of a fire-box for the plaintiff by a given time, and the article was not furnished within the time, and when it was furnished it was found to be utterly useless, and the plaintiff brought an action to recover the extra expense he had been put to in getting another fire-box, and sought to recover as special damage the damages he had been compelled to pay by reason of his inability to fulfil another contract, to which the contract for the fire-box was subsidiary, it was held that, as the plaintiff had not communicated to the defendant the serious consequences that would result if the fire-box was not furnished by the time appointed, he was not entitled to make them a ground of special damage. (n) And, where the plaintiff sent goods from Manchester by a railway company to his traveler at Cardiff, and the delivery of the goods was, though the negligence of the company, delayed until after the traveler had

(l) *Hadley v. Baxendale*, 23 L. J., H. & N. 408. *Fletcher v. Tayleur*, Ex. 179. *Williams v. Reynolds*, 6 B. 25 L. J., C. P. 65.

(m) S. 495; 34 L. J., Q. B. 221.

(n) *Portman v. Middleton*, 4 C. B.

(p) *Gee v. Lanc. & York. Ry. Co.*, N. S. 324; 27 I. J., C. P. 231.

left Cardiff, and the plaintiff, in consequence, lost the profits which he would have derived from a sale at Cardiff, it was held that, in the absence of notice to the company of the object for which the goods were sent, the plaintiff could not recover from them such profits as damages for the delay. (o) So, where a commercial traveler delivered a parcel of samples to a common carrier to be carried to A, but did not state the contents of the parcel, or the purpose for which it was required, and by the negligence of the carrier the parcel was delayed, and the traveler spent three days at A unemployed waiting for it, it was held that the carrier was not liable to pay the hotel expenses of the traveler during the time he was waiting for the parcel, such damages being too remote. (p)

489. *When the cost of previous legal proceedings may be recovered as part of the damages.*—If an agent promises to execute a commission for hire or reward, and breaks his promise, the general damage is the loss, injury, and inconvenience which immediately result from the non-execution of the thing agreed to be done. Special damages may arise and be recoverable, if the employer is himself only an agent acting on behalf of, and responsible to, a third party, and is sued by the latter, and has to pay damages and costs, in consequence of the defendant's breach of contract. Thus, where the plaintiff, a London broker, having received a commission from a merchant in Holland to purchase and ship from Porto Rico tobacco of the best quality, employed the defendant to execute the commission, and the defendant purchased and shipped a quantity of rotten tobacco of the very worst descrip-

(o) *Gt. Western Ry. Co. v. Redmayne*, L. R., 1 C. P. 329. And see *Hales v. The London & Northwestern Ry. Co.*, 4 B. & S. 66. (p) *Woodger v. G. W. Ry. Co.*, L. R., 2 C. P. 318; 36 L. J., C. P. 177.

tion, and the Dutch merchant refused to accept it, and brought an action against the plaintiff, and recovered all the damages that he had sustained by reason of his not having received in Holland the tobacco the plaintiff had agreed to send him, and the plaintiff then sued the defendant, it was held that he was entitled to recover all the damages and costs he had paid to the merchant in Holland, and also his costs incurred in defending that action, the plaintiff undertaking to hand over the rotten tobacco to the defendant, or to sell it and account with him for the net proceeds thereof. (q) So, if a principal, who has employed an agent to make a contract, repudiates the contract made by the agent, or denies his liability, and the agent is himself sued and defends unsuccessfully, he may, in an action against his principal, recover the costs of his of his unsuccessful defense, if in defending the action he has pursued the course which a prudent and reasonable man would have done under the circumstances. (r) Where a defendant demised premises for a term of years to the plaintiff, and covenanted that the plaintiff should occupy the same during the term "without any interruption whatsoever from or by the defendant, his executors, administrators, or assigns, or any other person or persons lawfully claiming by, from, or under him or them," and an action of trespass was afterwards brought by a person claiming under the defendant against the plaintiff, who gave notice of it to the defendant, who paid no attention to the notice and the plaintiff, acting on his own judgment, and without express authority, defended the action, in which a verdict was eventually found against him, and he was obliged to pay damages and costs; it was held

(q) *Mannering v. Brandon*, 2 Moore, 12, 8 Taunt. 202. (r) *Broom v. Hall*, 7 C. B., N. S. 503.

that he was entitled to recover from the defendant the costs and damages he had paid, and also the expenses he had himself incurred in defending the action of trespass. (s) But the cost of previous legal proceedings can only be recovered where they are the natural and proximate consequence of the breach of contract (t) and costs cannot be recovered which were incurred in upholding a defense manifestly untenable. (u)

490. *Pecuniary liabilities swelling the amount of damages.*—A pecuniary liability, incurred by the plaintiff in consequence of the breach of the defendant's contract, may form part of the damages, though it may be difficult to estimate the extent of such pecuniary liability. Where the plaintiff, having purchased seed barley with a warranty, sold it again with a similar warranty, and the warranty was broken, and the subvendee claimed damages from the plaintiff, his immediate vendor, it was held that the jury ought to take this item of claim and liability on the part of the plaintiff into their consideration in estimating the amount of the damages. (x)¹ But, where a purchaser buys goods ordinarily procurable in the market, and, before he has received them, sells them again, and the goods are not delivered by the first vendor, and the purchaser fails to deliver them to his vendee, he cannot charge the damages paid to the latter against the first vendor, if it appears that he had the means of

(s) *Rolph v. Crouch*, L. R. 3 Ex. 44; 37 L. J., Ex. 8.

(t) *Richardson v. Dunn*, 8 C. B. N. S. 655; 30 L. J., C. P. 47. *Pow v. Davis*, 1 B. & S. 220; 30 L. J., Q. B.

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(u) *Ronneberg v. Falkland Islands Co.*, 17 C. B., N. S. 1; 34 L. J., C. P. 34.

(x) *Randall v. Raper*, EL BL & EL 84; 27 L. J., Q. B., 266.

¹ See *Blaisdell v. Babcock*, 1 Johns. 517; *Coolidge v. Brigham*, 5 Metc. 68; *Indianapolis, &c. R. R. Co. v. O'Reilly*, 1 Ind. 160; *Marks v. Indianapolis, &c. R. R. Co.*, Id. 440.

fulfilling his sub-contract, by going into the market and supplying himself with the article, and delivering it to his vendee. (y)

Where a tenant holds over after a notice to quit, or after the expiration of his lease, and the landlord is compelled to pay damages to a party to whom he had contracted to let the land, these damages will be recoverable from the obstructive tenant. (z)

491. Excessive damages.—It is a general rule of law, that the indemnity to be recovered in respect of damages sustained by reason of a breach of contract shall be fairly proportioned to the real injury sustained; and the court will not permit a defendant to be mulcted in excessive damages. It is a rule, also that a catching bargain shall not be taken advantage of, so as to enable the plaintiff to put into his pocket a greater sum of money than will form a fair and reasonable compensation for the injury he has sustained by the breach of contract. Thus, where the defendant bought a horse of the plaintiff, and agreed to pay, as the price of the horse, "a barleycorn a nail, for each nail in the horse's shoes, doubling every nail" and there were thirty-two nails in every shoe, and the plaintiff, after doubling every nail, and reckoning the entire amount, claimed five hundred quarters of barley as the price of the horse, which the defendant refused to pay, Hyde, J., directed the jury to give no more than the actual value of the horse as damages; and they accordingly gave the plaintiff £8, which was held to be good. (a)¹

(y) Maule, J., *Peterson v. Ayre*, 13 C. B. 365. *Josling v. Irvine*, 30 L. J., Ex. 78, 6 H. & N. 512.

(z) *Bramley v. Chesterton*, 2 C. R. N. S. 592.

(a) *James v. Morgan*, 1 Lev. 111.

¹ See *Goodno v. Oshkosh*, 28 Wis. 300, *Kavasich v. Hasebrouck*, Id. 569.

492. Penal obligations.—In ancient times penalties were commonly resorted to, to secure the performance of contracts; and parties frequently bound themselves by penal obligations in heavy sums, to be paid in case they did not perform such and such covenants, or did, or omitted to do, certain specified acts or things. Much hardship was frequently sustained from these penalties; for all the material parts of a contract might be performed, yet, if the contract had not been literally fulfilled in every particular—if every one of a variety of things stipulated to be done was not done, either at the exact time, or in the exact manner, or with all the circumstances specified, according to the literal terms of the engagement—the whole penalty became forfeited and payable at common law, although the real damage sustained by the particular breach of contract complained of might be of the most trifling and contemptible character. Parties, consequently, who had incurred these forfeitures, and had become liable to the payment of these penalties, had often a strong claim in equity for relief; (*b*) and the Lord Chancellor, from a very early period, granted injunctions to restrain plaintiffs from issuing execution upon judgments obtained in the courts of common law for such penalties, and directed an issue to try, by the verdict of a jury, the amount of actual damage sustained, which damage, when assessed, the party was allowed to recover, but nothing further. (*c*)

493. Subsequently the legislature, by the 8 & 9 Wm. 3, c. 11, s. 8, has extended to defendants a reasonable relief and protection from penalties, by requiring the plaintiff in all actions upon any bond or any

Thornborow v. Whitacre, 2 Ld. Raym.

1164. Chesterfield v. Jansen, 1 Wils.

286.

(*b*) Mellish, L. J., Ex parte Hulse,

L. R., 8 Ch. 1022.

(*c*) Hardy v. Martin, 1 Cox, 26.

Roy v. Duke of Beaufort, 2 A/k. 191.

penal sum for non-performance of any covenants or agreements in any indenture, deed, or writing contained, to assign breaches, and the jury, upon the trial, to assess the damages that the plaintiffs have sustained thereby, (*d*) which damages only are to be recovered; but judgment for the amount of the penalty is to be entered and to stand as a further security to answer to the plaintiff such damages as may be sustained from further breach of any covenants in the same indenture, deed, or writing contained.

494. Penalties for breach of contract.—This statute embraces all penalties established to secure the performance of contracts, and is in all cases compulsory upon plaintiffs. “It is not in the power of a plaintiff to refuse to proceed according to the statute; he must assign the breach of such covenants as he proceeds to recover satisfaction for; and, if the defendant pleads to issue, and the cause goes to a jury for trial, the jury upon trial of such cause, must assess damages for such of the breaches assigned, as the plaintiff, upon trial of the issues, shall prove to have been broken.” (*e*) The statute, it will be seen, refers simply to penalties for the non-performance of contracts, and does not extend to any bond conditioned for the mere payment of money. Bail bonds, replevin bonds, post-obit bonds, and all bonds conditioned for the payment of a sum certain, at a day certain, are not within the statute; (*f*) but bonds for the payment of annuities, and of sums of money by installments, have been held to come within its provisions. (*g*) Where, a debt being payable by installments,

(*d*) 3 & 4 Wm. 4, c. 42, s. 16.

(*e*) Hardy & Bern, 5 T. R. 636, 540.

(*f*) Smith v. Bond, 3 M. & Sc.
528. James v. Thomas, 5 B. & Ad.
40. 1 Saund. 58, n. (b).

(*g*) Willoughby v. Swinton, 6 East,
550. Walcot v. Goulding, 8 T. R.
126. A warrant of attorney con-
ditioned for the payment of money by
installments, or to secure the payment

with interest, the debtor made default in payment of one of the installments, and by a deed, reciting that the creditor had agreed to give the debtor time, upon having the payment of the debt secured to him, with interest, "by the installments and in manner therein-after appearing," provision was made for payment of the debt, with interest, by installments different from the former ones, with a proviso that, upon default being made in payment of any installment, the whole unpaid portion of the debt, with interest, should become immediately payable, and the debtor made default, it was held that the proviso was not in the nature of a penalty, and that the creditor ought not to be restrained from enforcing immediate payment of the whole of the money remaining due. (*h*) So where a creditor agreed with his debtor to remit part of the debt upon having a mortgage to secure the payment of the balance within two years, without prejudice to his right to recover the whole debt if such balance was not paid within that time, and the debtor executed a mortgage for such balance, containing a proviso that, if the mortgage debt was not paid within the two years, the whole of the original debt should be recovered, and the debt was not paid within the two years, it was held that the proviso was not of the nature of a penalty from which the mortgagor was entitled to be relieved, and that the mortgagee could recover the whole debt. (*i*)

In an action upon a bond conditioned for the performance of covenants or collateral acts, the obligee cannot recover more damages against the obligor, for a breach of the condition of the bond, than the amount

of an annuity, is not within the statute. *Cox v. Rodbard*, 3 Taunt.

(*h*) *Sterne v. Beck*, 1 De G., J. & S. 595.

74. *Shaw v. Worcester*, 4 M. & P. 21.

(*i*) *Thompson v. Hudson*, L. R., 4 H. L. 1.

of the penalty and costs; for the bond ascertains the extent of the damage by consent of the parties; and, therefore, if a bond be conditioned for the performance of any act, and the obligee, by reason of the obligor's non-performance, sustains a damage far exceeding the amount of the penalty, yet he can only recover to the extent of the penalty and costs. (*k*) But, where the penalty is contained in a deed inter partes or an agreement, damages may be recovered beyond the penalty. When the performance of a covenant or agreement is secured by a penalty imposed in the contract itself, the plaintiff may, at his election, bring an action for the penalty, and recover the penalty (after which he cannot resort again to the covenants, because the penalty is to be a satisfaction for the whole), or, if he does not choose to go for the penalty, he may proceed upon the covenants, and recover more or less than the penalty *toties quoties*. (*l*) If he proceeds and recovers judgment for the penalty, he, of course, subjects himself to the restrictions imposed by the 8 & 9 Wm. 3, as to issuing execution upon such judgment, and must take the opinion of a jury as to the amount that he ought, under the circumstances, to be permitted to levy. But, if he rejects the penalty, and proceeds for his real damages, he may recover a sum larger in amount than the penalty, if the jury think him entitled to it. (*m*) A bond of indemnity, given to protect a purchaser of land against adverse claims threatened at the time of the purchase, was held to be valid to the full amount of the penal sum, which greatly exceeded the original purchase-money, there being no equity in the circumstances of the case to justify an interference

(*k*) *Wilde v. Clarkson*, 6 T. R. 304.

(*m*) *Winter v. Trimmer*, 1 W. Bl.

(*l*) *Lowe v. Peters*, 4 Burr. 2228. 395. *Harrison v. Wright*, 13 East
Hurst v. Hurst, 4 Exch. 579. And 343.

see *Legh v. Lillic*, 6 H. & N. 170, n.

with the legal right, and the purchaser having, in discharge of the claim and expenses incident thereto, expended a larger sum than the full amount of the penal sum named in the bond. (*n*)

495. *Liquidated damages*.—But a sum in solido, fixed upon by the parties, and limited to be paid by the one to the other as a compensation for a breach of contract, is not necessarily a penalty, such as courts of equity would have relieved against, or such as comes within the operation of the 8 & 9 Wm. 3, c. 11. If the damages accruing from a breach of contract are of an uncertain nature, and the parties have chosen to assess and fix them beforehand, by agreement amongst themselves, and the amount agreed upon is no more than what may be a fair and reasonable measure of damages, it is not a penalty within the meaning and operation of the statute, although it is denominated a “penal sum.” “A man in possession of an estate in the country,” observes Lord Eldon, “may set his own value upon the view, the timber, or other ornaments and conveniences of the property; and if he parts with the possession, he may part with it on the terms that a tenant shall use it or cultivate it in a particular way, or pay a large sum of money as a compensation for the damage or injury occasioned by his neglect. He may put an extraordinary value upon a particular piece of land or wood, on account of the amusement it may afford him; and if he chooses to stipulate for £5 or £50 additional rent upon every acre of furze broken up, or for any given sum of money upon every load of wood cut and stubbed up I see nothing irrational in such a contract.” (*o*) Where therefore, there was a reservation of an additional

(*n*) *Osborne v. Easles*, 2 Moo. P. C. W. S. 125.

(*o*) *Astley v. Weldon*, 2 B. & P. 351.

rent of £5 per acre for every acre of meadow land which the tenant should break up or convert into tillage, and of £50 for every acre of arable land which should not be laid down for grass, and so kept, it was held that the landlord was entitled to the increased rent for every acre dealt with, contrary to the stipulations of the lease. (p) And, where a tenant covenanted not to sow more than seventy acres in one year with clover, or, if he did so, to pay an additional rent of £10 per acre, it was held that such additional rent was not a penalty. (q) Where a contract for the sale of land provided that the purchaser should pay interest on the purchase-money, at £4 per cent., from the time of taking possession until the 1st of July, 1858, the day appointed by the contract for the payment of the purchase-money, and after that day at £5 per cent., if the purchase-money should not then be paid, and after the 1st of January, 1859, at £8 per cent., with a proviso, that this should not give the purchaser the right to delay the payment of the purchase-money on paying such higher rate of interest, and the purchaser took possession of the land in 1857, but, owing to circumstances not caused by the misconduct or negligence of the vendor, the purchase was not completed until 1865, it was held that the stipulation for a payment of a higher rate of interest was not in the nature of a penalty to secure the punctual payment of the purchase-money, against which the purchaser was entitled to be relieved, but a separate and distinct contract which he was bound to perform. (r)

In cases, also, influencing and affecting the per-

(p) *Birch v. Stephenson*, 3 Taunt. 469. *Rolfe v. Peterson*, 2 Bro. P. C. 436. *Denton v. Richmond*, 1 Cr. & M. 734. *Farrant v. Olmius*, 3 B. & Ald. 692.

(q) *Jones v. Green*, 3 Y. & J. 304. *Pollitt v. Forest*, 16 L. J., Q. B. 424. *Bowers v. Nixon*, 18 Id. 35.

(r) *Herbert v. Salisbury & Yeovil Ry. Co.*, L. R. 2 Eq. 221.

sonal feelings and affections, the amount of damages which ought to be awarded by way of compensation cannot easily be measured by the taste or judgment of third parties; it is often such as the persons interested can alone correctly estimate; and they are permitted, when that is the case, to calculate and fix them beforehand, at a precise sum to be paid as liquidated damages. If a man seals and delivers a written promise of marriage, whereby he promises to marry a particular lady, and in default to pay her the sum of £1,000, "that very sum is the ascertained damage, and the jury are confined to it." (s) If a deed or agreement contains covenants or promises for the performance of various acts and duties, and then provides for the payment of one large sum, such as £1,000, by way of compensation, in case of the non-performance of all or of any one of the things stipulated to be done, and the damages in every case of non-performance are altogether uncertain, the sum agreed to be paid will be treated as liquidated damages, and not as a penalty. Thus, where in a deed of co-partnership between the plaintiff and defendant, as surgeons, the defendant covenanted that after the determination of the co-partnership he would not, at any time, practice as a surgeon within two miles and a-half of Dorset Crescent, and would not prevail on any of the patients of the firm to withdraw from the plaintiff or employ any other medical man, but would as far as was in his power, promote the business of the plaintiff, and that if he infringed the covenant in any respect he would pay to the plaintiff £1,000 as liquidated damages, it was held that as the damages resulting from the breach of these different stipulations were altogether uncertain, and very difficult to

(s) *Lowe v. Peers*, 4 Burr. 2229.

reduce to a pecuniary standard, the parties had a right to measure them for themselves, and settle the amount to be paid for a breach of all or any one of the stipulations. (t) And the same point was decided in the case of a deed of dissolution of co-partnership between the plaintiff and defendant, as attorneys; (u) also where a defendant covenanted not to carry on the trade of a perfumer, toyman, and hair merchant, within the cities of London and Westminster, or within the distance of six hundred miles from the same respectively, and for the observance of the covenant, did bind himself to the plaintiff in the sum of £5,000 as and by way of liquidated damages; (x) and where, in an agreement between the plaintiff and defendant for the sale, to the plaintiff, of the lease and good-will of a tavern called the Blenheim Tavern, it was stipulated that the defendant should not thenceforth be in any way concerned in carrying on the trade of a licensed victualler within one mile of the Blenheim tavern, under the penal sum of £500, to be recovered as liquidated damages. In cases of this sort, the claim for damages depends not only on things which have been done, which are difficult of proof, but on what may be done, which it is impossible to prove, on the value of the customers which the vendor of the lease has attached to him, and on the number which his future conduct of the house which he has taken may draw to him. (y) On a guarantee that a vessel should sail with or before any other vessel then in the berth "under penalty of forfeiting one-half of the freight,"

(t) *Atkins v. Kinnier*, 4 Exch. 784;
19 L. J., Ex. 132. *Leighton v. Wales*,
3 M. & W. 545. *Reynold v. Bridge*,
6 Ell. & Bl. 528; 26 L. J., Q. B., 12.
Mercer v. Irving, Ell. Bl. & Ell. 563;
27 L. J., Q. B. 291.

(u) *Galsworthy v. Strutt*, 1 Exch.
663; 17 L. J., Ex. 226.

(x) *Price v. Green*, 16 M. & W. 316;
16 L. J., Ex. 108.

(y) *Crisdee v. Bolton*, 3 C. & P.
243.

another vessel having sailed first, it was held that "one-half of the freight" was recoverable as liquidated damages; and that it was immaterial whether the money intended to be made payable was called by the parties a penalty or liquidated damages. (z)

Where the obligee of a bond bound himself to complete certain smith's work in a church, in a limited time, and in default to forfeit and pay £10 for every week after the expiration of the time limited for the doing thereof, until the work should be completely finished, it was held that the £10 a week was recoverable as liquidated damages. (a) Whether the sum provided to be paid is to be treated as a penalty, or as liquidated damages, is a question of law to be decided by the judge upon a consideration of the whole instrument. (b)

496. Penalties under the denomination of liquidated damages.—If a contract contains stipulations for the performance of divers things, and the damages resulting from the non-performance of some of them are capable of being measured by a precise sum, and one sum is stipulated to be paid in respect of the non-performance of the contract generally, that sum is a penalty, although the parties may choose to call it liquidated damages, and even expressly declare that it is not a penalty. "Since the 8 & 9 Wm. 3, c. 11, parties, in framing agreements, have frequently changed the word penalty for liquidated damages; but the mere alteration of the term cannot alter the nature of the thing." If the sum, by whatsoever name called, is in point of fact a "penalty," the court will treat it as such; and the stipulation that it shall be recovered as

(s) *Sparrow v. Paris*, 7 H. & N. 594; *Duckworth v. Alison*, 1 M. & W. 412.
31 L. J., Ex. 137. *Legge v. Harlock*, 12 Q. B. 1015.

(a) *Fletcher v. Dyche*, 2 T. R. 36. (b) *Sainter v. Ferguson*, 7 C. B. 727.

liquidated damages will not prevent the party from insisting on the compulsory provisions of the statute as to assessing the damages. "There is one case," observes Chambre, J., "in which the sum agreed for must always be considered a penalty; and that is where the payment of a smaller sum is secured by a larger."

Where by articles of agreement between the plaintiff and defendant, the former was to pay the latter £1 11s. 6d. per week, and her traveling expenses, and the defendant was to perform at his theatres, and conform to the several rules and regulations of the theatres, and pay all fines that might become payable, and it was agreed "that either of the parties neglecting to perform that agreement should pay to the other of them the sum of £200," it was held that the £200 was a penalty; for, if the £1 11s. 6d. was not paid, or the traveling expenses were not paid, or a half-crown fine was not paid, the whole £200 would be recoverable. The effect of the agreement, therefore, was to give the plaintiff his option either to proceed upon the agreement *toties quoties*, or upon the first breach to proceed at once for the £200, out of which he might be satisfied for the damages actually sustained, and which might stand as a security against future breaches. (c) And where articles of agreement had been entered into between the plaintiff and the defendant for the sale and purchase of the good-will of a surgeon's business, and the lease of his house, for £800 and the stock-in-trade and fixtures for £170 4s., and amongst various other stipulations it was provided that the £170 4s. should be paid by certain bills of exchange in manner therein mentioned, "and for the true performance of the agreement the defendant and plaintiff did bind and oblige himself unto the other of them in the

(c) *Astley v. Weldon*, 2 B. & P. 352, 353.

penal sum of £500, to be recoverable for the breach of the said agreement as and by way of liquidated damages," it was held that the sum named was a penalty; for, if any part of the sum secured by the bills, however small, remained unpaid, the whole £500 would be recoverable; and wherever the payment of a smaller sum is secured by a larger, the latter sum must be considered a penalty. (*d*)

By articles of agreement between the plaintiff and the defendant, the latter agreed to act at Covent Garden Theatre for four seasons, and to conform to the usual regulations of the theatre, and the plaintiff agreed to pay him £3 6s. 8*d.* a-night; and it was agreed that, if either of them should neglect to fulfill the agreement, or any stipulation therein, such party should pay to the other £1,000, to which sum it was agreed that the damages sustained by any such neglect or refusal would amount, and which sum was thereby declared to be the liquidated and ascertained amount of the said damages, and not a penalty or penal sum, or in the nature thereof; but it was held that the sum so agreed to be paid was nevertheless a penalty, and that the parties could not change the thing by changing the name. "It is certainly difficult," observes Tindal, C. J., "to suppose any words more precise or explicit than those used in the agreement, declaring that the sum of £1,000 should be taken as liquidated damages, and not as a penalty. . . . But the clause is not confined to any single breach. If, on the one hand, the plaintiff neglected to make a single payment of £3 6s. 8*d.* per night, or, on the other hand the defendant refused to conform to any usual regulation of the theatre, it must be contended that the clause in question, in either case, would have given

(*d*) *Davies v. Penton*, 6 B. & C. 223.

the stipulated damages of £1,000. But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms, the case being precisely that in which courts of equity have always relieved, and against which courts of law have also in modern times endeavored to relieve, by directing juries to measure and assess the damages actually sustained by the breach of the agreement." (e)

By articles of agreement under seal, the defendant covenanted to demise to the plaintiff two messuages, the indenture to contain certain specified covenants and provisoes, and all other usual and reasonable covenants; and the plaintiff covenanted to accept the lease upon the terms specified, and to execute a counterpart thereof, and to pay the expenses of the lease and counterpart; "and for the true performance of the agreement each of the parties bound himself unto the other in the penal sum of £500, to be recovered against the defaulter as liquidated damages;" and it was held that the £500 must be considered as a penalty; for the forfeiture would not only attach on the defendant's refusal to grant the lease, but also on the plaintiff's refusal to pay the expenses of preparing the lease and counterpart. (f)

Pothier, in his treatise on the law of obligations remarks that, although a penalty or sum in solido is agreed to be paid for the very purpose of avoiding a discussion as to the amount of the damages which have been sustained, yet, being stipulated in lieu of damages, it is contrary to its nature to be carried be-

(e) *Kemble v. Farren*, 3 M. & P. 440. *Westbury, Thompson v. Hudson*, L. 440. *Betts v. Burch*, 4 H. & N. 506; R., 4 H. L. 30.
 28 L. J., Ex. 267. *Dimech v. Corlett*,
 12 Moo. P. C. 220. See per Lord

(f) *Boys v. Ancell*, 7 Sc. 364.

yond the limits which the law respecting damages prescribes; and, as the French law does not permit them to exceed double the value of the subject-matter of the contract, the judge ought to moderate an excessive penalty to which the one party has inconsiderately submitted, when the other has suffered no real injury, or one much below the amount stipulated to be paid. The party making default cannot, certainly, he observes, however excessive the sum agreed to be paid may be, dispute his having intended to oblige himself to the extent named, when the clause of the contract is express to that effect; for, *ubi est evidens voluntas, non relinquitur præsumptioni locus*; but he may have entered into the contract, in the first instance, with the most perfect honesty of intention, and a firm determination to carry it fully and completely into effect, but with an erroneous confidence in his own powers of performance; and the equity which ought to prevail in all mutual contracts entered into for the common benefit of both parties does not permit the one to make a profit, and unconscientiously to enrich himself, at the expense of the other. An excessive penalty or fixed sum, agreed to be paid in lieu of damages ought therefore, he says, to be reduced to what the damages resulting from non-performance of the contract amount to, at the very highest. (g) If again, he observes, a penalty has been imposed, or a sum in *solido* agreed to be paid, as the ascertained damage resulting from a breach of contract, and such contract has been partially performed, the party ought not to receive the whole penalty. Ulpian decides that, although in strictness of law the whole penalty has been incurred, nevertheless it is equitable that it should be so only in proportion to the part of the prin-

(g) Poth. (OBL.), No. 346, p. 192. cf. Dupin.

cial obligation which remains to be performed, the true reason being that, the penalty or liquidated sum being considered as a compensation for the non-performance of the principal obligation, the party seeking to enforce the contract cannot have both the one and the other. (*k*)¹

(*k*) Dumoulin de Divid. et Individ., p. 3, n. 112.

¹ The action of the court shall not be defined and determined by the terms which the parties have seen fit to apply to the sum fixed upon. Though they call it a penalty, or give to it no name at all, it will be treated as liquidated damages, that is, it will be recognized and enforced as the measure of damages, if, from the nature of the agreement and the surrounding circumstances, and in reason and justice it ought to be. And although they call it liquidated damages, it will be treated as a penalty, if, from a consideration of the whole contract, it appears that the parties intended it as such, or if, where the injury is certain, the sum fixed upon is clearly disproportionate to such injury, and the real claim which grows out of it." Parsons on Contracts, iii. p. 157, and see *Davis v. Hendric*, 1 Mon. T. 499; *Wilson v. Davis*, Id. 183; *Hatch v. Fogarty*, 33 N. Y. Superior Ct. 166; *Smith v. Coe*, Id. 480; *O'Donnell v. Rosenberg*, 14 Abb. (N. Y.) Pr. N. S. 59; *Wolf Creek, &c. Co. v. Shultz*, 71 Pa. St. 180; *Gray v. Crosby*, 18 Johns. 219, 226; *Bagley v. Peddie*, 5 Sandf. 192; *Williams v. Dakin*, 22 Wend. 211; *Hoag v. McGinnis*, Id. 163; *Heard v. Bowers*, 23 Pick. 455, 462; *Sessions v. Richmond*, 1 R. I. 298, 303; *Plummer v. McKean*, 2 Stewart, 423; *Jordan v. Lewis*, Id. 426; *Mead v. Wheeler*, 13 N. H. 351; *Cutler v. How*, 8 Mass. 257; *Perkins v. Lyman*, 11 Id. 76; *Smith v. Smith*, 4 Wend. 468; *Knapp v. Maltby*, 13 Id. 587; *Dakin v. Williams*, 17 Id. 447; *Brewster v. Sagerly*, 13 N. H. 275, 278; *Niven v. Rossman*, 18 Barb. 50; *Jackson v. Baker*, 2 Edr. Ch. 471; *Heard v. Bowers*, 23 Pick. 455; *Shute v. Taylor*, 5 Metc. 61, 67; *Moover v. Platte Co.*, 8 Mo. 467; *Carpenter v. Lockhart*, 1 Cart. (Ind.) 434; *Bright v. Rowland*, 3 How. (Miss.) 398, 413, *Cheddick v. Marsh*, 1 N. J. 463; *Carry v. Saror*, 7 Pa. St. 470; *Beale v. Hayes*, 5 Sandf. 640; *Bagley v. Peddie*, Id. 192.

SECTION II

SPECIFIC PERFORMANCE.

497. *Of specific performance of contracts.*—There are very many cases in which money compensation for a breach of contract affords a very inadequate remedy, and one which falls far short of what complete justice requires; and the court of chancery, from a very early period, in the exercise of its equitable jurisdiction, enforced the specific performance of contracts in cases where damages at law would not have afforded a complete remedy. (i)¹ In the case of contracts for the purchase and sale of lands, estates, and houses, the court will compel the vendor to convey the estate agreed to be sold to the purchaser, and to enter into all the usual covenants for title, and will compel the purchaser to pay the purchase-money, whether the price has been ascertained and fixed by the parties themselves, or whether it has to be determined by valuation, (k) it being considered that compensation in damages is not an adequate remedy, and that the purchaser ought to have the estate which he has agreed to buy, and the vendor to sell, (l)² whilst in the case of contracts for the sale of corn, wine, hops, sugar, and of merchandise in general, and all such things as can be readily purchased in the open market, the court re-

(i) 1 Fonbl. Eq., book 1, ch. 1, § 5.

Story Eq. Jur. § 717.

(k) Collier v. Mason, 25 Beav. 203.

(l) Flint v. Brandon, 8 Ves. 162.

Wilkinson v. Clements, L. R., 6 Ch.

96; 42 L. J., Ch. 38.

¹ 1 Parsons on Contracts, p. 491.² 2 Story on Eq., §§ 717, 727.

fuses to interfere, because it is obvious that in such cases the money which will buy the article affords the speediest and best compensation that can be given to the purchaser, (*m*) unless the chattel is of a peculiar character, having a *pretium affectionis*, such as a statue, a picture, the Pusey horn, or the silver tobacco-box, mentioned subsequently, when the court will compel the vendor to deliver to the purchaser the very identical article agreed to be sold, (*n*) unless it appears that the price given was wholly inadequate, and that the purchaser had taken some unfair advantage of an ignorant vendor. (*o*)¹ So, as regards contracts for the purchase and sale of stock and shares generally, the court will not decree specific performance in favor of a purchaser who can at once go into the market and buy the shares; but, if the contract was for the sale of certain specific, ascertained or numbered shares, and calls have been made upon those very shares, from payment of which the vendor is entitled to be relieved, or if the remedy by recovery

(*m*) *Buxton v. Lister*, 3 Atk. 384.

(*o*) *Falcke v. Gray*, 29 L. J., Ch. 28;

(*n*) *Post*, p. 381.

5 Jur. N. S. 645.

¹ 1 *Fraud*, 1; *Seymour v. Delancey*, 6 Johns. Ch. 225, *Acker v. Phoenix*, 4 Paige, 305; *Nellis v. Clark*, 20 Wend. 24; *Miller v. Chetwood*, 1 Green. Ch. 199, gross misrepresentation (*Best v. Stow*, 2 Sandf. Ch. 298; *Schmidt v. Livingston*, 3 Edw. Ch. 213; *Rodman v. Zilley*, Saxton, 320; *Brealey v. Collins*, Younge, 317), or concealment, may prevent the specific enforcement of the contract by mere inadequacy of price—not gross and not attended by circumstances indicating fraud or oppression—is not sufficient to avoid it (*Whitefield v. McLeod*, 2 Bay, 380; *Stewart v. The State*, 2 Har. & G. 114; *Knobb v. Lindsay*, 5 Hamm. 472; *King v. Bardeau*, 6 Johns. 38; *Judson v. Wass*, 11 Id. 525; 3 Cranch. 270; 2 Bay, 11; *Cannon v. Mitchell*, 2 Desaus, 320; *Wright v. Dekline*, C. C. 199; *Rankin v. Matthews*, 7 Ired. L. 286; *Shel Capron*, 3 R. I. 171).

of damages is inadequate, (*p*) the court will interfere in favor of the vendor, and compel the purchaser to accept a transfer and complete the bargain. (*q*) If the contract is conditional, there can be no decree in favor of a person who has not fulfilled the condition imposed upon him. (*r*) Specific performance will not, in general, be granted, unless the court can give mutual relief to both parties. (*s*) But the circumstance that an agreement, of which specific performance is sought, contains stipulations on the part of a plaintiff which could not themselves be specifically enforced, affords no valid objection to making a decree in favor of the plaintiff, if the intention of the parties was that the performance of those stipulations should be secured by covenant only. (*t*) Where the principal agreement cannot be enforced, specific performance of the accessory agreement will not be decreed, (*u*) the general rule being that, when the court cannot compel the performance of the agreement in its entirety, it will not compel performance of any particular portion of it. (*v*) Possible inconvenience to the public is no ground for refusing specific performance of an agreement. (*x*)

Among the various contracts which have been decreed to be specifically performed, are promises by

(*p*) *Oriental Inland Steam Co. v. Briggs*, 2 Johns. & H. 625.

(*q*) *Cheale v. Kenward*, 3 De Gex & J. 27; 27 L. J., Ch. 784.

(*r*) *Weston v. Collins*, 34 L. J., Ch. 353

(*s*) *Blacket v. Bates*, 35 L. J., Ch. 324. *Ogden v. Fossick*, 32 L. J., Ch. 73. *Peto v. Brighton, Uckfield & Tunbridge Wells Ry. Co.*, 1 H. & M. 168; 32 L. J., Ch. 677.

(*t*) *Wilson v. Hartlepool Harbor Ry. Co.*, 34 L. J., Ch. 241; 2 De G., J. & S. 475.

(*u*) *Scottish r. Northeastern Ry. Co. v. Stewart*, 3 Macq. H. L. Cas. 382.

(*v*) *Meschants' Trading Co. v. Banner*, L. R., 12 Eq. 18; 40 L. J., Ch. 515. *Stocker v. Wedderburn*, 3 K. & J. 393, 407; 26 L. J., Ch. 713. *Ogden v. Fossick*, 4 De G. F. & J. 426; 32 L. J., Ch. 73.

(*x*) *Raphael v. Thames Valley Ry. Co.*, 36 L. J., Ch. 209. And see *Lloyd v. Lond., Chat. & Dover Ry. Co.*, 2 De G., J. & S. 568; 34 L. J., Ch. 401.

an executor or trustee to leave a legacy to the parties for whom he is trustee, in case they consent to the sale of certain property, where the consent is given, and the trustee dies without making the promised bequest ; (*y*) contracts for the sale of debts proved under proceedings in bankruptcy ; (*z*) agreements for the sale of the good-will of a trade and the exclusive use of a secret therein, (*a*) or for the sale of a patent ; (*b*) contracts to insure against loss by fire ; (*c*) agreements for the grant of an annuity, (*d*) or for the partition or division of joint property, or property held in common ; (*e*) covenants and agreements in writing by a landlord to grant a lease, (*f*) or oral agreements, where the tenant has been let into possession, and has expended money on the faith of the contract, (*g*) provided the terms of the agreement can be distinctly ascertained, and the acts of part performance are referable to that agreement alone ; (*h*) contracts to renew a lease, where the intended tenant continues solvent, (*i*) and there has been no willful neglect or refusal, on the part of the tenant, to renew or pay the stipulated or customary fine upon renewal ; (*k*) contracts for the erection of buildings, where works have been laid out and partially executed, in fulfilment of the contract, which enabled the court to ascertain

(*y*) *Ridley v. Ridley*, 34 L. J., Ch. 462.

(*z*) *Adderly v. Dixon*, 1 Sim. & St. 610.

(*a*) *Bryson v. Whitehead*, 1 Sim. & St. 74.

(*b*) *Cogent v. Gibson*, 33 Beav. 557.

(*c*) *Story's Eq. Jur.* § 722.

(*d*) *Wellesley v. Wellesley*, 4 Myl. & Cr. 579.

(*e*) *Beckley v. Newland*, 2 P. Wms. 182.

(*f*) *Martin v. Pycroft*, 2 De G., M. & G. 798. *Rankin v. Lay*, 29 L. J., Ch. 734. *Parker v. Taswell*, 27 Id. 812. *Middleton v. Greenwood*, 2 De G., J. & S. 142.

(*g*) *Pain v. Coombs*, 3 Sm. & G. 464. *Nunn v. Fabian*, L. R., 1 Ch. 35.

(*h*) *Price v. Salusbury*, 32 Beav. 446.

(*i*) *Neale v. Mackenzie*, 1 Keen, 484.

(*k*) *Chesterman v. Mann*, 9 Hare, 213.

exactly what was intended to be done ; (*l*) contracts by a defendant, to make a road, or build a bridge, on the defendant's land for the use of the plaintiff, (*m*) or on the plaintiff's land ; (*n*) and contracts to execute a mortgage with an immediate power of sale. (*o*) But the court does not, in general, enforce specific performance of building contracts, or the performance of work, it being considered that a pecuniary compensation, in the shape of damages, is the appropriate remedy. (*p*) Nor will the courts decree specific performance of a contract for a partnership, where there has been no part performance, (*q*) or of articles of apprenticeship, (*r*) or of an agreement to refer. (*s*) Nor will the court grant specific performance of an agreement for the building of a house of a certain value, or according to a certain plan to be subsequently approved of, or an agreement to make repairs in a house, or to write a book. (*t*) Where, however, the agreement is to build a house according to a plan and to take a lease of it, the plaintiff may waive specific performance of that part of the agreement relating to the building of the house, and may have damages for that part and specific performance of the rest of the agreement. (*u*) And specific performance of a contract for the purchase of a lease will not be decreed, where, from pending and threatened litigation, it is

(*l*) *Price v. Corp. Penzance*, 4 Id. 509. *Oxford v. Provand*, L. R., 2 P. C. 135.

(*m*) *Storer v. Gt. West. Ry. Co.* 2 Y. & C. 53. *Wilson v. Furness Ry. Co.*, L. R., 9 Eq. 28 ; 39 L. J., Ch. 19.

(*n*) *Greene v. West Cheshire Ry. Co.*, L. R., 13 Eq. 44 ; 41 L. J., Ch. 17.

(*o*) *Hermann v. Hodges*, L. R. 16 Eq. 18.

(*p*) *Moseley v. Virgin*, 3 Ves. 184. *Flint v. Brandon*, 8 Id. 162.

(*q*) *Story's Eq. Jur.* § 1457.

(*r*) *Webb v. England*, 29 Beav. 44.

(*s*) *Scott v. Rayment*, L. R., 7 Eq. 112.

(*t*) *Brace v. Wehnert*, 25 Beav. 351 ; 27 L. J., Ch. 572.

(*u*) *Soames v. Edges*, Johns. 669. *Mayor. &c. of London v. Southgate*, 38 L. J., Ch. 141.

impossible to ascertain to whom the ground-rent is payable, and the purchaser must be involved in immediate litigation. (*x*) Nor will specific performance of a charter-party be decreed; but the court will restrain the parties from employing the ship in a manner inconsistent with the rights under the charter-party. (*y*)

The courts will decree specific performance of all promises of portions, gifts, and settlements made in consideration of marriage; (*z*) also of covenants by a father, on the marriage of his daughter, to give or bequeath to such daughter an equal share with his other children of any property he may possess at the time of his death; (*a*) covenants by a husband to settle after-acquired property upon his wife; deeds or articles of separation; (*b*) and covenants made by a husband, on his marriage, to make a provision for his wife, which will be enforced, although the wife at the time she seeks the assistance of the court may be living in notorious adultery. (*c*) But a contract which is framed so as to hold out an inducement to married persons to separate is null and void. (*d*) "All the authorities prove," observes Lord Cottenham, "that, with respect to marriage contracts, there can be no resistance of performance on the part of one, because another contracting party has failed to perform his part of the agreement; and the obvious reason is, that the parties to the contract are not the only persons having an interest in the subject, but the con-

(*x*) *Pegler v. White*, 33 Beav. 403.

(*y*) *Post*, p. 383.

(*z*) *Post*, bk. 2, ch. 4, sect. 4.

(*a*) *Fortescue v. Hennah*, 9 Ves. 66.

Willis v. Black, 4 Russ. 170. *Welles-*

ley v. Wellesley, 4 M. & Cr. 579.

Grafey v. Humpage, 1 Beav. 54.

Hughes, in re, 4 Giff 432, 436.

(*b*) *Wilson v. Wilson*, 23 L. J., Ch.

700. *Gibbs v. Harding*, L. R., 5 Ch.

336; 39 L. J., Ch. 374. *Sanders v.*

Rodway, 16 Jur. 1005.

(*c*) *Seagrave v. Seagrave*, 13 Ves

444.

(*d*) *Post*, bk. 2, ch. 4, sect. 4.

tract is made by them on behalf of the issue of the marriage. Although, therefore, in the case of an ordinary contract, a party who has not performed his part may not be entitled to claim the benefit of it against the other party, it is different in marriage articles, where the two contracting parties reciprocally enter into contracts for the benefit of a third party." (e)¹

498. *Specific performance of oral contracts* for the sale or lease of lands will also, in certain cases, be decreed, where there has been a part performance by possession having been taken of the subject-matter of the contract, although the contract is required by the statute of frauds to be authenticated by writing; (f) it being considered fraudulent in either party to withdraw from the contract without the consent of the other, where acts have been done in fulfillment of the contract. Where a father promised the proposed husband of his daughter to give him and his intended wife a house to live in after their marriage, and the marriage was celebrated, and the husband received possession of the house, and treated it as his own, and laid out money upon it in improvements, on the strength of the ante-nuptial promise of the father-in-law, and afterwards the father-in-law died, and the heir claimed the house, the court of chancery ordered the ante-nuptial promise to be specially performed,

(e) *Lloyd v. Lloyd*, 2 M. & Cr. 204.

(f) *Parker v. Taswell*, 2 De Gex & J. 571. *Nunn v. Fabian*, L. R., 1 Ch. 35.

¹ The decree of specific performance must be induced by the circumstances of each case. See *Peck v. Hoyt*, 39 Conn. 1; *Hubbell v. Von Schoening*, 49 N. Y. 326; *Lawrence v. Dorsey*, 4 Hars. & McH. 205; *Cooper v. Pena*, 21 Cal. 404; *Perkins v. Wright*, 3 Harr. & McH. 324; *King v. Hamilton*, 4 Pet. 211; *Waters v. Howard*, 1 Md. Ch. Dec. 112; 8 Gill, 262; *Howard v. Ellis*, 4 Sandf. 369.

and compelled the heir to execute a conveyance of the property and carry the intention of the promisor into full effect. (*g*)¹.

The courts will not, it seems, decree specific performance of any contract under seal, in the total absence of a consideration. "The court," observes Lord Cottenham, "will not execute a voluntary contract; and my impression is, that the principle of the court to withhold its assistance applies to a covenant or a settlement." (*h*)

499. Specific performance will not, of course, be decreed when the contract has been made between parties not competent to contract, (*i*) or where it is founded upon an illegal or an immoral consideration, or has been procured by misrepresentation, misstatement, or fraud, (*k*) or where there has been a clear mistake, (*l*) or where it is doubtful whether the defendant meant to contract to the extent to which he is sought to be charged. (*m*) But specific performance of an agreement will not be refused merely on the ground that one of the contracting parties has mistaken its legal effect. Thus, where a lessor's agent had contracted to grant a lease for seven or fourteen years, which the lessor understood to make a lease determinable at the lessor's option, it was held that the

(*g*) *Sarcome v. Pinniger*, 22 L. J., Ch. 419.

(*k*) *New Bruns. & C. Ry. Co. v. Mugridge*, 30 L. J., Ch. 242.

(*h*) *Jeffreys v. Jeffreys*, 1 Cr. & Ph. 141.

(*l*) *Wood v. Scarth*, 2 K. & J 33.

(*i*) *Story's Eq. Jur.* § 751, 787. *Vansittart v. Vansittart*, 4 K. & J. 62.

(*m*) *Harnett v. Gelding*, 2 Sch. & Lef. 554.

¹ See *ante*, p. 757, note 1; and *Union Bank v. Edwards*, 19 M. & J. 364; *Harris v. Knickerbocker*, 5 Wend. 638; *Tilton v. Tilton*, 9 N. H. 585. See *Beard v. Linthicum*, 1 Md. Ch. Dec. 348; *Drury v. Conner*, 6 Harris & J. 288; *Small v. Owings*, 1 Md. Ch. Dec. 363; *Dewey v. Watson*, 1 Gray 414; *Plunket v. Methodist Episcopal Society*, 3 Cush. 561; *Black v. Cord*, 2 Harris & G. 100.

lessee was entitled to have the agreement specifically performed, and to have a lease for fourteen years determinable at his own option at the end of seven years. (*n*)

If it is provided that, if either party neglects or refuses to fulfill his part of the engagement, he shall pay a sum of money to the other by way of penalty for non-performance, or as liquidated damages, the court will, nevertheless, decree a specific performance, if that is the appropriate remedy, just as if no such proviso had been inserted; and the defendant cannot, by forfeiting the penalty, get rid of the agreement. (*o*) Where persons have entered into an agreement to execute a deed containing certain provisions, the court will order the execution of such deed, without regard to the question whether or not its provisions are such as the court can decree to be specifically performed, the object being to vest in the parties the legal rights which they have mutually agreed to confer on each other. (*p*) The court of chancery has in many cases decreed the specific performance of agreements which were so far preliminary that they were to be expanded and embodied in larger terms, and were left with a solicitor for that purpose; but, where there are elements of uncertainty about the contract, and it does not appear to have been a complete and concluded bargain, the court will not grant a decree for specific performance. (*q*) Where, therefore, on the making of a contract for sale or purchase, it is agreed

(*n*) *Powell v. Smith*, L. R., 14 Eq. 85.

(*o*) *Hopson v. Trevor*, 1 Str. 533.
French v. Macale, 2 Drur. & War. 269.
Long v. Bowring, 33 Beav. 585.

(*p*) *Stocker v. Wedderburn*, 3 K. & J. 403; 26 L. J., Ch. 713.

(*q*) *Tillett v. Charing Cross Bridge Co.*, 28 L. J., Ch. 863. *Ridgway v. Wharton*, 6 H. L. C. 288; 27 L. J., Ch. 46. *Taylor v. Portington*, 7 De G. M. & G. 328.

that the price to be paid shall be fixed by arbitration, and no arbitrators have been appointed, and no price has been fixed, there can be no decree. (r) But the courts disapprove of vendors endeavoring to retain the power of escaping from their contracts by introducing provisions for valuing some minor part of the subject-matter of the contract, and refusing to appoint a valuer; and in such cases the courts will decree specific performance as to the main subject-matter of the contract. (s)

The court will not enforce specific performance of an agreement with an auctioneer, for the sale by him of books, paintings, and works of art, though a sum of money was paid down by the auctioneer at the time of the execution of the agreement, which money was to be repaid to him out of the proceeds of the sale; (t) but, if goods are deposited in the hands of an auctioneer or agent, to be sold by him, in order that he may re-pay himself his advances upon them, the authority, being coupled with an interest, cannot be revoked; and the auctioneer or agent may sell for the purpose of re-paying himself his advances, in spite of the prohibition of the principal; (u) but it is otherwise if the advances have not been made in consideration of the authority to sell. (x) If the agent has only a lien on goods deposited in his hands, he must resort to the courts for an authority to sell. (y)

Granting specific performance is a matter entirely in the discretion of the court. It is not, however, an arbitrary discretion, but is guided and regulated by fixed and settled rules. (z)

(r) *Darbey v. Whitaker*, 4 Drew.

140. *Milnes v. Grey*, 14 Ves. 408.

(s) *Richardson v. Smith*, L. R., 5 Ch. 648; 39 L. J., Ch. 877.

(t) *Chinnock v. Sainsbury*, 30 L. J.,

Ch. 409.

(u) *Post*, bk. 2, ch. 4, sect. 2.

(x) *Post*, bk. 2, ch. 4, sect. 2.

(y) *Post*, bk. 2, ch. 4, sect. 2.

(z) *Haywood v. Cope*, 25 Beav. 151;

27 L. J., Ch. 471.

In certain cases, where a suit has been instituted for a specific performance of a contract, oral evidence has been permitted to be given of a subsequent oral agreement acted upon by the parties inconsistent with the equitable enforcement of the original written contract. Such evidence, it is said, does not in anywise contradict or alter the terms of such original contract, but simply shows, from what has subsequently occurred between the parties, that the plaintiff has no equity for a specific performance; (a) for, if the defendant can show any circumstances de hors the writing, making it inequitable to interpose for the purpose of a specific performance, the court, having satisfactory information upon that subject, will not interpose. (b) But a mere oral agreement, subsequently entered into and not acted upon in any way, will not be allowed to control, alter, or discharge the original written contract. There must be "such a part performance of the new parol agreement as would enable the court to grant its aid in the case of an original, independent agreement; and then, in the view of equity, it is tantamount to a written agreement, and effect will be given to it." (c)

500. *Performance sub modo*.—In some cases a performance of an agreement will be decreed, not according to the letter of the contract, if that would be unconscientious, but according to the change of circumstances. (d)

501. *Specific performance of statements and representations forming the foundation of a contract*.—"It is a very hard old head of equity," observes Lord Eldon, "that, if a representation is made to an

(a) *Legal v. Miller*, 2 Ves. Sen. 299.
 (c) *Davis v. Symonds*, 1 Cox, 404.

(c) 1 Sugd. Vend. & Pur. 170, ed. 1846. *Price v. Dyer*, 17 Ves.

(b) *Clewes v. Higginson*, 1 Ves. & 364.
 B. 527.

(d) Story's Eq. Jur. § 775.

other person, going to deal in a matter of interest upon the faith of that representation, the person making the representation shall be compelled to make it good if he knows it to be false." (*e*) Thus, the courts will compel parties making representations concerning the fortunes of persons about to be married, knowing them to be false, to make such representation good. (*f*) Where, for example, a father represented that his daughter would have a fortune of £10,000 on the death of her parents, and a contract of marriage was entered into on the faith of the representation, the father was compelled to make good the representation he had made. (*g*)

502. Orders for the specific delivery of chattels wrongfully detained.—In certain cases, where parties cannot be fully and fairly compensated with pecuniary damages for the loss of some peculiar chattel wrongfully detained by another, the courts will give relief by ordering the specific chattel detained to be delivered up to the owner. And, where a chattel of a particular character, not readily to be purchased in the market, or a chattel having certain associations connected therewith, which may give it some peculiar value in the eyes of the owner, has been delivered and accepted upon some express trust, and the depositary retains it in his hands contrary to that trust, he will be compelled to execute the trust reposed in him. (*h*) Where the defendant had got into his hands a richly-chased silver tobacco-box belonging to the members of a club, who used the box on festive occasions, and entertained a peculiar regard for it, the Lord Chancellor, at the instance of the club, ordered the box to be

(*e*) *Evans v. Bicknell*, 6 Ves. 183.

Hill v. Lane, L. R., 11 Eq. 215; 40

L. J. Ch. 41.

(*f*) *Post*, bk. 2, ch. 4, sect. 4.

(*g*) *Bold v. Hutchinson*, 24 L. J. Ch. 290.

(*h*) *Ante*, p. 374. 17 & 18 Vict

125, s. 7.

delivered up to them, an action for damages being considered a very inadequate remedy. (*i*) Whenever certain specific chattels have been placed in the hands of a depositary or an agent, and the latter, in breach of his duty to his employer or principal, contracts for the sale of these goods to a third party, the depositary or agent will be restrained from parting with the possession of the property. (*k*)

503. Injunction to compel performance, or to restrain a breach of contract.—Where there is a contract to abstain from doing a specific thing, and the damage sustained by its violation cannot be precisely or conveniently estimated in money, the courts will, by injunction, restrain a party from doing the thing that he has promised not to do, and thus enforce performance of the contract, or prevent a breach of it. If a lessee, for example, covenants to spend all his hay or manure on the farm, or if he covenants not to let the demised premises for any part of the term, or if a person covenants not to carry on a certain trade within a certain district, the courts will restrain such party from removing the hay or manure, or letting or assigning, or carrying on the trade, (*l*) although there is a proviso for the forfeiture of the lease or the payment of a penalty or liquidated damages in case of the non-performance of the covenants. (*m*)

Where a solicitor sold his business, and covenanted with the purchaser that he would not practice as a solicitor in any part of Great Britain for the space of twenty years, without the purchaser's consent, the court granted an injunction to restrain the solicitor

(*i*) *Fells v. Read*, 3 Ves. 71.

(*k*) *Wood v. Rowcliffe*, 3 Hare,
308.

(*l*) *Greenaway v. Adams*, 12 Ves.

400. *Benwell v. Inns*, 26 L. J., Ch.
663.

(*m*) *Barrett v. Blagrove*, 5 Ves.
555. *Howard v. Woodward*, 34 L.
J., Ch. 47.

from infringing his covenant. (n) And a penalty imposed upon a solicitor's clerk for breach of an agreement not to practice within a certain distance of his employer's place of business will not prevent the court from granting an injunction. (o) Where a messuage was granted to the defendant and his heirs, to the intent and purpose that the trade of a baker should not at any time be carried on therein, the court granted an injunction to restrain the defendant, his heirs and assigns, from carrying on such trade. (p) So, where the lease of a house and the good-will of the trade of a cheesemonger were sold and assigned upon an understanding, by word of mouth, that the vendor would not set up the same trade in the same street, the court, by decree, restrained the vendor from infringing the oral contract. (q) Where mutual covenants were entered into between a lady and the parson, churchwardens, and overseers of a particular parish, whereby it was covenanted that a new cupola, clock, and bell should be erected by the lady for the benefit of the parish, and that the the early morning bell, which was rung at five o'clock, should not be again rung in the lifetime of the lady, and the cupola, clock, and bell were erected, and the bell was silent for two years, when it was again rung, the court of chancery decreed an injunction against the ringing of the bell. (r)

In the case of transfers of shares, where directors have disregarded the forms of their deed of settlement in the mode of transfer they have established,

(n) *Whitaker v. Howe*, 3 Beav. 383.
Giles v. Hart, 5 Jur. N. S. 1381. As
 to the validity of these contracts, see
ante, p. 205.

(o) *Howard v. Woodward*, 34 L. J.,
 Ch. 47.

(p) *Hodson v. Coppard*, 9 W. R.
 9. *Johnstone v. Hall*, 2 K. & J.
 421.

(q) *Harrison v. Gardner*, 2 Mad.
 198.

(r) *Martin v. Nutkin*, *ante*, p. 108.

the courts will interfere (s) by injunction, to prevent them from annulling their forms and revising their own rules and regulations to the prejudice of bona fide purchasers. (t)

The principle of the jurisdiction is to bind men's consciences to a fair and strict performance of their agreements, not leaving the party with whom the contract has been broken to the chance of what a jury may give in the shape of damages, but enforcing, what it can, the literal performance of the contract. Where there is a contract containing a positive agreement to do something, accompanied by a negative agreement not to do another thing, and complete justice can be done between the parties, the court will restrain the breach of the negative agreement, although it may be unable to enforce performance of the positive agreement. Where a young lady agreed to sing at the Queen's Theatre for a certain number of nights, and that she would not during the period sing anywhere else, but afterwards accepted an engagement, and agreed to sing at a rival theatre, the court, by injunction, restrained her from singing at the rival theatre, although it had no power to compel her to sing at the Queen's Theatre. (u)¹ And the court will interfere where there is no distinct negative stipulation, and where, therefore, the negative obligation is inferred only from the positive contract. (x) But, where the principal portion of an agreement is

(s) *Post*, bk. 2, ch. 1, s. 3.

Catt v. Tourle, L. R., 4 Ch. 654; 38

(t) *Bargate v. Shortridge*, 5 H. L.

L. J., Ch. 665.

Cas. 297.

(x) *Montague v. Flockton*, L. R.,

(u) *Lumley v. Wagner*, 21 L. J.,

16 Eq. 189. *Wolverhampton, &c. Ry.*

Ch. 898; 1 De G., M. & G. 618.

Co. v. London & N. W. Ry. Co., L.

Webster v. Dillon, 3 Jur. N. S. 432.

R., 16 Eq. 433, 440; 42 L. J., Ch. 677.

¹ But see *Daly v. Smith*, reported in *Morgan's Law of Literature*, vol. ii. chapter on *Stageright*, and cases cited.

incapable of specific enforcement by the court, and it appears that the entire agreement has been broken, no relief will be granted in respect of a negative clause, therein contained, which is merely incidental to the general relief sought, although such clause might have been enforced had it stood alone, or had the agreement been in other respects still subsisting and undisputed. (y) Where a vessel has been engaged under a charter-party for the performance of a particular voyage, the court will, in certain cases, indirectly enforce performance of the contract by restraining the shipowner from employing his vessel in a manner different from that agreed upon. (z) And where a landowner has granted an easement, privilege, or incorporeal right, the court will restrain the vendor and all who buy the land burdened with the easement or servitude, from preventing the exercise of the privilege. So, where an easement is sold by parol, and has been enjoyed for years, the court will not allow the privilege to be re-called by the vendor or any person claiming under him, unless such person can show that he was a purchaser of the land for value without notice. (a)

504. *Enforcement of performance of covenants and agreements not to build, plant, or inclose.*—

A covenant or agreement between a vendor and purchaser on the sale of land, that the purchaser and his assigns shall use, or abstain from using, the land in a particular way, will be enforced, by injunction, against the immediate parties to the contract, (b) and, against all subsequent purchasers who purchase the

(y) *Brett v. East India & Lon. J., Ch. 457. Le Blanch v. Granger Shipping Co., 2 H. & M. 404. 35 Bea. 287.*

(z) *De Mattos v. Gibson, 28 L. J., (a) Hervey v. Smith, 22 Bea. 302. Ch. 502. Sevin v. Deslandes, 30 L. Fox v. Pursell, 3 Sm. & G. 242.*

(b) *Rankin v. Huskisson, 4 Sim. 13.*

land with notice of the existence of the covenant, whether the covenant be or be not a covenant running with the land (*c*), unless the party entitled to the performance of the contract has acquiesced in the non-observance thereof, and slumbered over his rights. (*a*) But the court never grants the summary remedy by injunction except in those cases where it would be strictly equitable to grant it. "And it often becomes," observes Sir T. Plumer, "a consideration of great importance with reference to property in the metropolis, how far parties shall be permitted to go back and to revive long antecedent covenants and engagements, and give them an application to the buildings of the metropolis in its present rapidly increasing state." The circumstance that a work undertaken in breach of a valid covenant is one of great public importance is not sufficient to induce the courts to refuse to restrain the breach of covenant. (*e*)

If the condition of the property has become entirely changed and altered, and a new set of interests and rights has been created since the covenant was entered into, so that it would be unfair and unjust to enjoin a strict performance of the covenant, the courts will leave the parties to their remedy by recovery of damages, and will decline to interfere by injunction; (*f*) and "it must not be supposed," observes Lord Brougham, "that incidents of a novel kind can be devised and attached to property at the

(*c*) *Tulk v. Moxhay*, 2 Phil. 774. *Mann v. Stephens*, 15 Sim. 377. *Cole v. Sims*, 1 Kay, 56; 5 De G. M. & G. 1; 23 L. J., Ch. 37. *Patching v. Dubbins*, Id. 45. *Clements v. Willes*, L. R., 1 Eq. 200; 35 L. J., Ch. 265. *Western v. McDermott*, L. R., 2 Ch. 72; 36 L. J., Ch. 76. *Keates v. Lyon*, L. R., 4 Ch. 218; 38 L. J., Ch. 357.

(*d*) *Roper v. Williams*, 1 Turn. & Russ. 18. *Child v. Douglas*, 2 Jur. N. S. 950; 23 Law T. R. 283.

(*e*) *Lloyd v. Lond., Chat. & Dover Ry. Co.*, 34 L. J., Ch. 401; 2 De G., J. & S. 568.

(*f*) *Bedford v. Trustees, &c.*, 2 Myl. & K. 573.

fancy or caprice of any owner. It is inconvenient to the public weal that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves and their personal representatives to answer in damages for breach of their obligations; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote." (g) All covenants nevertheless, entered into by vendors or purchasers of lands, providing that the land sold or purchased by them shall be used for the purpose of pleasure and the personal accommodation and convenience of the inhabitants of certain houses, and shall not be inclosed or built upon, or injured by the introduction of manufactories, or the carrying on of particular trades crafts, and professions, or the conveyance of heavy goods across it, may in general be enforced by injunction against all subsequent purchasers who buy and take possession of the property with notice of the covenant. (h)

Where the owner of an estate built several houses upon it, and sold some of them, subject to a covenant on the part of the purchaser, that he would keep the area, in front of the houses inclosed with open iron palisades, and would not suffer a single shop window to be put up in them, or carry on any trade business, or calling whatever in them, or upon the adjoining premises, or suffer the same to be used to the annoyance, nuisance, or injury of any of the houses on the estate, it was held that all subsequent assignees and purchasers of the houses who took them with notice

(g) *Keppel v. Bailey*, 2 Myl. & K. 538.

(h) *Whatman v. Gibson*, 9 Sim. 206.

of the covenants were bound by them ; and an injunction was granted to prevent one of the houses being used as a girl's school ; and it was further held that the covenantee had not waived the benefit of the covenant, although he had permitted other houses held under a like covenant, to be used as schools ; (i) for it does not follow that, because a plaintiff has permitted one infringement of a covenant, he is bound to permit another. (k) But, where a covenant was entered into by purchasers of land for building, that the buildings should all be erected on a general plan, and the covenantee relaxed the covenant, and allowed important deviations from the plan in favor of some of the covenantors, and others, who had not been licensed to deviate, did deviate, and the covenantor did not interfere with promptitude, but allowed the parties to expend a considerable sum of money, and then applied, by injunction, to prevent them from infringing their covenant, the court refused to interfere, saying, that it was a proper case for compensation in damages, and not for an injunction. (l) And the same principle was applied, where the defendant had executed the deed after the breach by the other covenanting parties had been committed, and where the covenant was also a covenant between all the purchasers inter se. (m) An injunction is not, in general, granted where the plaintiff has acquiesced in the performance of the act he seeks to prohibit. If, with a full knowledge of all the circumstances, he has lain by

(i) *Kemp v. Sober*, 1 Sim. N. S. 520 ; 20 L. J., Ch. 602.

(k) *Lloyd v. London, Chatham & Dover Ry. Co.*, 34 L. J., Ch. 401 ; 2 De G., J. & S. 568. *Western v. McDermot*, L. R., 2 Ch. 72 ; 35 L. J., Ch. 190 ; 36 Id. 76.

(l) *Roper v. Williams, Turn. & Russ.* 22. As to the parties entitled to the benefit of these covenants, see *Schreiber v. Creed*, 10 Sim. 9.

(m) *Peck v. Matthews*, L. R., 3 Eq. 515.

and made no complaint or objection, when he ought, in justice, to have warned the wrongdoer, the court will refuse its assistance. But acquiescence in a breach of covenant not attended with substantial damage will not bar the right to restrain a subsequent breach so attended. (*n*)

505. *Injunctions to compel parties to abide by their own statements and representations.*—Where the defendant, being possessed of certain leasehold estates, sub-let a part of the demised premises to the plaintiff on the strength of a representation that he, the defendant, was prevented by the covenants of the lease from building so as to obstruct the sea view, and thereby received an increased price for his land, and stood by whilst the sub-lessee erected houses on the property sub-let, which were valuable by reason of the sea view, and would be almost worthless without it, the court interfered by injunction to prevent the defendant from building so as to obstruct the sea view from the houses so erected. (*o*)¹

506. *Foreign contracts.*—A foreign contract, as a general rule, will not be enforced, unless it is valid

(*n*) *Western v. McDermot*, L. R., 2 Ch. 72; 35 L. J., Ch. 190; 36 Id. 76. (*o*) *Piggott v. Stratton*, 29 L. J., Ch. 1.

¹ See *Scymour v. Delancey*, 6 Johns. Ch. 225; *Acker v. Phoenix*, 4 Paige, 305; *Nellis v. Clark*, 20 Wend. 24; *Miller v. Chetwood*, 1 Green. Ch. 199; gross misrepresentation, *Best v. Stow*, 2 Sandf. Ch. 298; *Schmidt v. Livingston*, 3 Edw. Ch. 213; *Rodman v. Zilley*, Saxton, 320; *Brealey v. Collins*, *Younge*, 317; *Peck v. Hoyt*, 39 Conn.; *Hubbell v. Schoening*, 49 N. Y. 326; *Lawrence v. Dorsey*, 4 Harr. & McH. 205; *Cooper v. Pena*, 21 Cal. 404; *Whitefield v. McLeod*, 2 Bay, 380; *Stewart v. The State*, 2 Har. & G. 114; *Knobb v. Lindsay*, 5 Hamm. 472; *King v. Bardeau*, 6 Johns. 38; *Judson v. Wass*, 11 Id. 525; 3 Cranch, 270; 2 Bay, 11; *Cannon v. Mitchell*, 2 Desaus, 320; *Wright v. Dekline*, Pet. C. C. 199, *Rankin v. Matthews*, 7 Ired. L. 286; *Sheldon v. Capron*, 3 R. I. 171;

both by the law of the country in which it was made, and by the law of the country in which it is sought to be enforced. (*p*)

(*p*) 2 Spence's Eq. Jur. 13, 14. *Hope v. Hope*, 8 De G. M. & G. 731.

Perkins v. Wright, 3 Harr. & McH. 324; *King v. Hamilton*, 4 Pet. 311; *Waters v. Howard*, 1 Md. Ch. Dec. 112; 8 Gill, 262; *Howard v. Ellis*, 4 Sandf. 369.

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